

Missouri Attorney General's Opinions - 1945

| Opinion | Date | Topic | Summary |
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| 1-45 | Jan 2 | CONSTITUTIONAL ELECTIONS. | County Courts cannot consolidate election precincts for the constitutional election February 27, 1945. |
| 2-45 | Aug 4 | SCHOOL DISTRICT TAXES. | Changes in New Constitution will have no effect on the present school year's income. The assessment now being made on merchants' and manufacturers' will be available for the fiscal school year of 1945-1946. |
| 2-45 | Aug 11 | MARRIAGE LICENSES. | Duties of recorder of deeds in issuing marriage licenses to minors. |
| 2-45 | Oct 25 | PAUPERS. BURIALS. CORONERS. DEAD HUMAN BODIES. | Duty of coroner to bury dead body of pauper after inquest no longer exists; where body is claimed by relative, county where dead man resided has duty to pay for burial expenses when he is buried and if wife has not the necessary means. Burial must be made at direction or with consent of the County Court. |
| 5-45 | Apr 25 | TOWNSHIP BOARDS. | Township boards will be required to comply with the provisions of Section 8821, R. S. Mo. 1939, in fixing their maximum levy of tax for road and bridge purposes in the year 1945. |
| 5-45 | Sept 26 | TAXATION. | Franchises must be taxed under Class 3 of Section 4, Article X, Constitution of 1945. |
| 6-45 | Jan 16 | OFFICERS' COMMISSIONS. PUBLIC ADMINISTRATORS. | When proper commission was not delivered to Public Administrator by prior Governor and prior Secretary of State, same should be issued by the present Governor, properly attested by the present Secretary of State. |
| 6-45 | Apr 27 | CORPORATIONS. | Secretary of State has no authority to revoke certificate of change of name of corporation. |
| 6-45 | July 23 | SECRETARY OF STATE. | The inclusion of lists of employees of the Departments of State Government who have left the service in the last biennium in the Official Manual of Missouri. |
| 6-45 | July 26 | Hon. Wilson Bell | WITHDRAWN |
| 6-45 | Aug 8 | STATE SERVICE OFFICER. | Salary of State Service Officer. |
| 6-45 | Nov 15 | STATE SERVICE OFFICER. OFFICERS. CIRCUIT CLERK. | A Circuit Clerk may also serve as an Assistant State Service Officer. |
| 6-45 | Nov 26 | SHERIFF'S OFFICE. | When a vacancy occurs in the office of Sheriff, 9 months prior to a |

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| | | VACANCY. SPECIAL ELECTION. TENURE. | general election, the person elected at a special election called by the Co. Court, may hold the office under his commission for the complete period of the unexpired term and until his successor is elected and qualified, at the general election for that office in 1948. |
| 6-45 | Dec 19 | RAILROADS INCORPORATION TAX - -CERTIFICATE TO CARRY ON BUSINESS IN MISSOURI. | A foreign railroad corporation newly organized in another State to purchase, and which does purchase, the assets and property at a foreclosure sale of a former liquidated railroad must pay incorporation tax under Sec. 113, page 470, Laws of Missouri 1943. Secretary of State not authorized to issue certificate to such corporation to carry on a railroad business in this State until such tax is paid. |
| 7-45 | Feb 7 | COUNTY PURCHASES. | No statute requiring county court to advertise for bids in purchase of supplies. |
| 10-45 | July 10 | COUNTY. ROADS AND BRIDGES. | Construction of Sec. 8485, R.S. Mo. 1939, in view of facts stated in request. |
| 10-45 | Nov 6 | TAXES. | Employees working in the Dr. Edmund A. Babler Memorial Park do not come within the provisions of the State and Federal Unemployment Compensation Act. |
| 11-45 | Feb 26 | COUNTY COURTS. | Authority to appoint agent under Sec. 13766, R. S. Mo. 1939, and to provide compensation for discharge of duties under such appointment. |
| 11-45 | Mar 9 | TAXATION. PERSONAL PROPERTY ASSESSMENT. | Situs of personal property of business and manufacturing corporations for assessment determined by location of personal property on June 1, under Section 109585, R.S. Mo. 1939. |
| 11-45 | May 1 | GENERAL ROAD DISTRICTS— TAXATION. | How road taxes may be levied in road districts other than special road districts under township organization. |
| 11-45 | June 11 | TOWNSHIP ORGANIZATION. | Special Road Districts incorporated in counties under township organization are not entitled to any portion of the taxes arising from levies and charges. |
| 11-45 | Sept 6 | ELECTIONS. | Conviction for felony disqualifies voter until full pardon is granted, except as to persons sentenced to Intermediate Reformatory and disqualified under Section 9120a, Mo. Stat. Ann. (Laws of 1943), or restored to citizenship under Sections 4188, 4210, 4561, 9086 or 9227, R. S. Mo. 1939. |
| 11-45 | Sept 26 | CRIMINAL COSTS. | Fee bills filed with the County Court to be acted upon are subject to the Statutes of Limitations; Defense of limitations may be waived by county. |
| 11-45 | Nov 15 | CRIMINAL LAW. | State has right to appeal only when information or indictment is adjudged insufficient, or where judgment thereon has been arrested or |

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| | | | set aside because of the insufficiency of the indictment or information. |
| 11-45 | Dec 29 | ELECTIONS. COUNTY COURTS. COURTHOUSE AND JAIL BONDS. | Time of calling of special election, upon proper presentation of petition, vested in the County Court. |
| 12-45 | Mar 2 | SCHOOLS. | Three questions regarding extension of city or town school district by extension of city or town limits. |
| 12-45 | Sept 11 | MAGISTRATE. OFFICERS. | Qualifications for office of Magistrate under Section 25, Article V, of the Constitution of Missouri, 1945. |
| 13-45 | Jan 31 | SALARIES AND FEES. | Board of Probation and Parole should pay the salary of the secretary employed by it and located in the office of the Lieutenant Governor; also pay their proportionate part of the janitor's salary used for it in said office. |
| 13-45 | Mar 8 | COURTS. | When held on holidays. |
| 13-45 | May 7 | COUNTY HOSPITAL. | County Court is without authority to change location of county hospital built under provisions of Section 15192, R. S. Mo. 1939. |
| 13-45 | May 31 | NEPOTISM. | Relationship existing between step-father and step-son. |
| 13-45 | June 8 | Hon. L. Madison Bywaters | WITHDRAWN |
| 13-45 | June 13 | COUNTY TREASURERS WARRANTS. | Treasurer should not pay warrants upon which judgments have been rendered. |
| 13-45 | Aug 9 | INTOXICATING LIQUOR. | Liquor tax provided in Section 4900, R. S. Mo. 1939, to be paid before sale or delivery in the State of Missouri for Naval areas in the State of Missouri. |
| 13-45 | Sept 26 | SALARIES AND FEES. COUNTY SURVEYOR. | County surveyor in counties of 20,000 to 50,000 inhabitants, who is also ex officio highway engineer, can charge for fees allowable under statutory provisions. |
| 13-45 | Oct 9 | RECORDER OF DEEDS. | To issue certified copy of records free of charge to veterans when such records are to be used to claim benefits under the Service Men's Readjustment Act of 1944. |
| 14-45 | May 4 | EMBALMING. CORONER. | Authority of coroner to send dead body to undertaker. |
| 15-45 | Oct 22 | SCHOOL FUND LOANS. | Applicability of Sec. 7, Art. IX, of the Constitution of 1945 to outstanding school fund loans and to investments of the capital of county and township public school funds. |
| 15-45 | Oct 25 | INHERITANCE TAX. | Applicability to Sec. 577, R.S. Mo. 1939, and Sec. 597, R.S. Mo. 1939 |

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| | | STATUTE OF LIMITATIONS. | (prior to amendment, Laws 1943, p. 307). |
| 16-45 | Mar 19 | SCHOOLS. | Applicability of Section 7, Article IX, of the new Constitution of Missouri to outstanding county school fund loans. |
| 16-45 | May 22 | CONSTITUTIONAL LAW. EFFECTIVE DATE OF STATUTES. | Time for preparing resolution authorized by Section 29, Art. III of the Constitution. Effect of Section 659, R. S. 1939. |
| 17-45 | Feb 8 | CONSTABLE AND OFFICERS. | May constable qualify who failed to take the prescribed oath within the time provided by statute. |
| 17-45 | June 29 | STATE GEOLOGIST POWER TO APPOINT AN ENGINEER & ASSISTANTS. | Section 14892, R.S. Mo. 1939, not mandatory in requiring appointment of competent engineer and assistants. Such appointees when appointed are employees, not officers. District Engineer of the United States Geological Survey is eligible for such appointment. |
| 17-45 | Aug 1 | COUNTY COLLECTORS. | Regarding the purchase of tax receipt books by county collector. |
| 17-45 | Oct 18 | BUILDING FUND OF CONSOLIDATED SCHOOL DISTRICT. | 1. Can Building Fund be transferred to Incidental Fund. 2. If such fund is so transferred, would the County Treasurer be protected, etc., by warrant of Board of Education. |
| 17-45 | Oct 22 | SCHOOL FUND LOANS. | Applicability of Sec. 7, Art. IX, Constitution of 1945 to outstanding county school fund loans and to disposition to be made of fines and forfeitures. |
| 18-45 | Jan 3 | PROSECUTING ATTORNEYS. | Prosecuting Attorneys entitled to receive compensation for office while legally holding title thereto. |
| 19-45 | Aug 20 | JUVENILE COURT. | Deputy probation officers in Jackson County may receive not to exceed \$3,000.00 per annum; Clerks and stenographers may receive not less than \$1500.00 nor more than \$2400.00 per annum; all of said salaries to be set by the Circuit Court. |
| 20-45 | Jan 24 | PROBATE COURTS. | Regular term in session ends upon death of the Judge. |
| 20-45 | Sept 12 | COMMUNITY SALES. | State Veterinarian given power to approve veterinarians examining livestock at sales. |
| 21-45 | Nov 21 | TAXATION AND REVENUE. | Method of assessing property of manufacturing corporations. |
| 22-45 | Mar 27 | MISSOURI STATE MUSEUM. | (1) Authority of Missouri State Department of Resources and Development with respect to exhibits not in Museum and exhibits hereafter acquired; (2) suggested forms of agreements to be used in acquiring exhibits; (3) suggested form of agreement to be used in |

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| | | | making loans of exhibits. |
| 22-45 | Apr 25 | MISSOURI STATE DEPARTMENT OF RESOURCES AND DEVELOPMENT. | Duties and authority with respect to functions previously discharged by the Planning Board of the State of Missouri and with respect to the Missouri State Museum. |
| 22-45 | July 27 | LEGISLATURE. | Duly elected officers of the House of Representative entitled to compensation as provided by law until the end of the session in which they have been elected, unless sooner removed by the members of the Legislature. |
| 22-45 | Sept 20 | MUNICIPAL CORPORATIONS. | Authority to acquire and control real property for the purpose of operating airports within and without the State of Missouri. |
| 24-45 | July 17 | SERVICEMEN. | Certain parts of Senate Bill No. 32 unconstitutional. |
| 24-45 | Aug 20 | COUNTY SURVEYORS. | Qualifications of persons elected or appointed to the office of County Surveyor. |
| 24-45 | Dec 13 | PARDON AND PAROLE. | Six questions regarding authorization of the Governor, Board of Probation and Parole, and Board of Penal Commissioners to issue commutations, parole, or pardons to inmates at the Missouri Training School for Boys, Industrial Home for Girls, and Industrial Home for Negro Girls. |
| 26-45 | Jan 12 | ELECTION. | Precincts cannot be consolidated nor canvass lists omitted in Kansas City for Special Constitutional Election on February 27, 1945. |
| 26-45 | Jan 24 | COUNTY CLERK. | County Clerk not entitled to pay from School Funds for making loans. |
| 26-45 | Feb 1 | STATE FAIR GROUNDS. | Repeal of clause in Section 14155, R. S. Mo. 1939, would not eliminate reverter clause from conveyance by which state acquired title. |
| 27-45 | Jan 29 | RECORDERS OF DEEDS. | Compensation. |
| 27-45 | Feb 1 | INSURANCE. | Approval of increase of capital stock of the Midwestern Fire & Marine Ins. Co., St. Louis, Mo. |
| 27-45 | Aug 3 | TAXATION AND REVENUE. | Duties enjoined upon County Collectors under the provisions of Article 9 of Chapter 74, R. S. Mo. 1939. |
| 27-45 | Sept 11 | TAXATION. | Authority of State Tax Commission to review and correct original assessments. |
| 27-45 | Oct 18 | TAXATION AND REVENUE. | An interest received by purchaser of certificate of purchase in first and second tax sale, and rights of purchaser of certificate of purchase at third tax sale. Section 11126, R. S. 1939, conflicts in part with Sec. 13, Art. X, Const. 1945, but is saved until July 1, 1946, by Sec. 2, Sch. 1945. |
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| 27-45 | Dec 15 | CORPORATIONS. | Not liable for franchise tax while charter is forfeit for failure to make reports. |
| 28-45 | Mar 8 | PUBLIC OFFICERS. JUSTICES OF THE PEACE. NEW CONSTITUTION. | Justices of the Peace elected prior to effective date of the New Constitution will continue to serve out their terms. |
| 28-45 | June 4 | PURCHASING AGENTS. PENAL INSTITUTIONS. | Purchasing agents, before purchasing tobacco, shall file requisition for said tobacco with the Commission of the Department of Penal Institutions. |
| 29-45 | Mar 14 | CONSTITUTION. | Applicability of Art. X, Sec. 12, of the New Constitution of Missouri to counties under township organization. |
| 29-45 | Nov 30 | PRIVATE CAR TAX. | Officers authorized to supervise expenditure of funds allocated to counties having no township organization. |
| 29-45 | Dec 19 | Hon. Melvin E. Fish | WITHDRAWN |
| 31-45 | Apr 11 | OFFICERS. | County officer may be ousted for willful neglect of duties or failure to personally devote his time to duties of his office. |
| 31-45 | Apr 13 | COUNTY CLERK. | Certain duties in connection with the office of county clerk. |
| 31-45 | June 11 | PUBLIC RECORDS. | When servicemen become entitled to certified copies of records free of charge. Discharges must be recorded free of charge. Recorders are not authorized by statute to charge for making copies of records. |
| 31-45 | Nov 2 | TAXATION. | Incorporated city within special road district under township organization not entitled to funds of the district. |
| 32-45 | Feb 24 | ROADS. CRIMINAL LAW. PUBLIC NUISANCE. | One who damages roads by turning water on it may be prosecuted and, in addition, act may be abated by Prosecuting Attorney as public nuisance. |
| 33-45 | Mar 8 | TAXATION. | Real property acquired by municipality for use as airport is exempt from taxation. |
| 33-45 | July 6 | COUNTY COURTS. | County court may reconsider, set aside or modify its judgment at the same term of court in which the judgment reconsidered was made. |
| 35-45 | Mar 2 | ESTATE TAX. | (1) Applicability of Federal estate tax statutes in determining Missouri estate tax. (2) Applicability of Federal estate tax on property exempt from Missouri inheritance tax in determining Missouri estate tax. |
| 35-45 | June 26 | Hon. Charles S. Greenwood | WITHDRAWN |
| 37-45 | Feb 27 | DEPARTMENT OF FINANCE. | Construing a sales contract as not infringing upon banking business. |
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| 37-45 | Mar 9 | BANKS. | Who may rent safe deposit boxes. |
| 37-45 | Apr 13 | LIQUIDATION OF A LOAN & INVESTMENT CO. | Department of Finance may hold funds remaining on liquidation of company. |
| 37-45 | Apr 27 | LOAN AND INVESTMENT COMPANIES. | Procedure by Commissioner of Finance to revoke license. |
| 37-45 | July 14 | Hon. Leo J. Harned | WITHDRAWN |
| 37-45 | Sept 24 | CORONER. SHERIFFS. | The coroner should hold an inquest in connection with the performing of an autopsy and it is within the discretion of the county court to pay for the performance of a post-mortem examination. Whether the sheriff is entitled to a fee for driving insane persons, who have escaped from another state to the Missouri State line. |
| 38-45 | Jan 27 | SHERIFF'S FEES. | May only receive compensation for days actually attending court. |
| 39-45 | Feb 9 | LIQUOR. | May sell intoxicating liquor in the original package on the premise described in your request. |
| 40-45 | Feb 20 | Hon. David W. Hill | WITHDRAWN |
| 41-45 | Feb 9 | REAL ESTATE COMMISSION. | Commission not authorized to revoke license on written statement or letter of complainants against licensee; Commission may not take depositions outside State. |
| 41-45 | May 4 | REAL ESTATE COMMISSION. | Banks and trust companies not required to secure real estate broker's license for the corporation to sell real estate loans, unless bank or trust company engages in the business of making loans for others. |
| 41-45 | June 5 | CRIMINAL PROCEDURE. | When and for what purpose plea of nolo contendere may be used as evidence. |
| 41-45 | Aug 10 | MISSOURI REAL ESTATE COMMISSION. | Power to issue license to minor. |
| 41-45 | Oct 18 | COUNTY COURTS. | The authorization of the County Court of Maries County to contribute funds of the County for the erection of a memorial building under Article II, Chapter 138, R. S. Mo. 1939. |
| 41-45 | Oct 23 | MISSOURI REAL ESTATE COMMISSION. | (1) Authority to issue separate types of licenses to the same person for the same licensing period. (2) Authority to promulgate rules relative to issuance of two separate licenses to same person for the same licensing period. |
| 42-45 | June 27 | BUILDING AND LOAN. NOTICE. | Notice of annual or semiannual meetings. |

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| 43-45 | Jan 16 | ELECTIONS. | (1) Envelopes used to carry out the provision of the official war ballot law may be amended for use in a special election; (2) Ballot used for civilian absentee voting in special election may be used as ballots for soldier voting. |
| 43-45 | Jan 23 | COUNTY TREASURER. DRAINAGE AND LEVEE DISTRICT. FEES. | Fee and compensation allowed treasurer of levee district organized by county court. |
| 43-45 | Apr 4 | INTERMEDIATE REFORMATORY. PENAL. | The court cannot lawfully assess concurrent sentences for burglary and larceny where a person is charged both offenses in same count. |
| 43-45 | June 30 | Hon. V. Don Hudson | WITHDRAWN |
| 44-45 | Apr 6 | MAGISTRATE COURTS. JUSTICES OF THE PEACE. | Magistrate Courts law under New Constitution will not become effective until July 1, 1946, unless sooner implemented by legislation. |
| 44-45 | Oct 22 | SHERIFF'S FEES. | Sheriff is not entitled to his fee for services rendered until the litigation is ended. |
| 45-45 | Aug 30 | BOARD OF HEALTH. | Children born in wedlock are presumed to be legitimate, but if person filling in standard certificate of live birth is informed that child is illegitimate it must be so recorded on certificate. |
| 45-45 | Oct 5 | CHIROPODY. | "Podiatry" is synonymous with "chiropody," and State Board of Health may determine eligibility of any applicant for admission to practice in this state. |
| 45-45 | Dec 27 | MUTUAL INSURANCE COMPANIES. | 1) Mutual Insurance Companies organized under Art. 7, Chap. 37, R.S. Mo. 1939, are not subject to general laws governing stock insurance companies, including statutes vesting in the State Department of Insurance regulation over rates charged by stock companies, and, 2) Mutual Insurance Companies organized under said Art. 7, Chap. 37, may issue a non-assessable policy if such company has a surplus guarantee fund of at least \$100,000.00. |
| 46-45 | Jan 5 | Hon. Ira A. Jones | WITHDRAWN |
| 46-45 | Jan 17 | MISSOURI COMMISSION FOR THE BLIND. | Last proviso in Section 9456 construed; also, method for striking names from the blind pension roll by the State Auditor. |
| 46-45 | Mar 7 | Hon. Ira A. Jones | WITHDRAWN |
| 46-45 | May 14 | BLIND PENSIONS. | Commission in determining residence is not bound to follow declared |

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| | | | intention but may consider all available facts. |
| 46-45 | Sept 27 | CRIMINAL PROCEEDINGS. | Official court reporter not required to report preliminary hearings. Fee for such work should be 15¢ for 100 words. |
| 46-45 | Oct 1 | COUNTY COURTS. | Regarding the legality of a county road bond issue submitted to the voters, under Section 8607, R.S. Mo. 1939; bond issue void. |
| 46-45 | Nov 8 | OFFICERS. | Employees of this State not prohibited by Article VII, Section 9 of the Constitution of 1945, from holding position of employment under the United States. |
| 46-45 | Nov 19 | BLIND PENSION. | Question of Qualification of an applicant for Blind Pension. |
| 47-45 | Mar 20 | SPECIAL ROAD DISTRICTS. | Right to receive funds arising from taxes levied on property within the boundaries of special road districts organized under the provisions of Art. 11, Chap. 46, R. S. Mo. 1939, in the year of incorporation and organization. |
| 48-45 | June 1 | COUNTY COURTS. PINBALL MACHINES. | Cannot require licenses and assess taxes thereon unless empowered to do so by statute. |
| 48-45 | July 17 | CRIMINAL LAW. CONSERVATION COMMISSION. | Section 8967, R. S. Mo. 1939, fixes a penalty for the violation of rules and regulations adopted and promulgated by the Conservation Commission. |
| 49-45 | Feb 1 | COUNTY LIBRARY DISTRICTS. | District should not include territory of a school district supporting a public library by school taxes. Manner and time of conducting election on library proposition and qualification of voters. |
| 49-45 | Feb 21 | APPROPRIATION. CONSTITUTION. | Section 13051, R. S. Mo. 1939, is not in conflict with Section 43, Article IV, and is therefore constitutional. |
| 49-45 | May 11 | MILEAGE FEES. | Marshal, sheriff or other officer operating under Sec. 13414, R. S. 1939, entitled to charge ten cents for each mile actually traveled in completing service of process, when served more than five miles from place where issued. |
| 51-45 | June 14 | STATE SENATORIAL REDISTRICTING COMMISSION. | (1) Necessity of appropriation by General Assembly for payment of salaries of members of Commission; (2) Right of Commission to reimbursement for outlays for necessary clerical help. |
| 52-45 | May 4 | CONSTITUTIONAL LAW. | Board of Jury Commissioners for Jackson County shall follow provisions of Sections 697 and 719, R. S. Mo. 1939, until July 1, 1946, unless sooner amended to conform to new Constitution. |
| 52-45 | May 16 | TAXATION. INCOME TAX. | Is a Missouri resident liable for income taxes on salaries and earning outside of the State of Missouri? Is a citizen of a bordering state liable for income tax on salaries or income earned within the State of Missouri? |
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| 52-45 | June 20 | CONSTITUTIONAL LAW. | Senate Bill 165 does not attempt to authorize impairment of obligations of contracts and is not in conflict with the United States Constitution. |
| 53-45 | June 18 | CORPORATIONS. | Authority of co-operative corporations organized under Art. 28, Chap. 102, R. S. Mo. 1939, to deal in the buying and selling of agricultural products. |
| 54-45 | July 9 | GENERAL ASSEMBLY. | Member of General Assembly ineligible for appointment as a member of the local Board of Public Works for the City of Bowling Green, Missouri. |
| 55-45 | Aug 18 | SCHOOLS. | Consolidated district not required to furnish transportation for elementary pupil assigned to a school in another county when such other school is within 31/2 miles of the pupil's home. |
| 56-45 | Feb 6 | Mr. Russell Maloney | WITHDRAWN |
| 56-45 | May 1 | PARTNERSHIPS, LIMITED. | Corporations and limited partnerships may both use the word "limited" or its abbreviation at the end of the names under which they transact business. |
| 56-45 | May 9 | SHERIFFS. | Can handle criminal cases in Justice Court and receive fees for services. |
| 57-45 | Jan 31 | AUTOMOBILES. | Criminal liability of innocent purchaser of an automobile through forged transfer of certificate of title. |
| 57-45 | Feb 6 | COUNTY COURTS. SCHOOLS. | County court cannot borrow county school fund. |
| 57-45 | Mar 27 | INDIGENT INSANE INMATE OF COUNTY FARMS. | County Court cannot recover for maintenance of such person as such inmate. |
| 57-45 | May 15 | CRIMINAL COSTS. | State remains primarily liable for fees of its own witnesses even though judgment may be rendered against defendant for costs. |
| 57-45 | Aug 28 | CORONER. | The Coroner is not entitled to mileage under the statute and taxi fare for travel too. |
| 57-45 | Sept 25 | SHERIFFS. | Fees allowed for summoning petit jury. |
| 57-45 | Oct 24 | CONSTITUTION. PROBATE JUDGES. | (1) Construction of Art. V, Sec. 27, Constitution of 1945 with respect to incumbents in the office of probate judge; (2) qualifications of persons appointed as judge of probate to fill vacancies occurring in current term. |
| 58-45 | Feb 6 | DENTISTRY. | Unlawful advertising. |
| 58-45 | Oct 24 | PARKS. | City of second class may lease portion of public park for professional baseball games during limited periods. |
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| 59-45 | Mar 9 | BOARD OF PHARMACY. | May not make rules to prevent compounding and dispensing of drugs by a person issued a permit to conduct a drug store or pharmacy in village of less than five hundred inhabitants; but may refuse to grant permit, in its sound discretion. |
| 59-45 | June 13 | MOTOR VEHICLE COMMISSIONER. SECRETARY OF STATE. | Motor Vehicle Commissioner cannot reopen, set aside or change decision after driver's license has been revoked or suspended. |
| 59-45 | Sept 12 | MOTOR VEHICLES. | Commissioner may refuse to license motor vehicles so constructed that they would cause excess and unnecessary noises when operated upon the highways of the state of Missouri. |
| 60-45 | July 27 | TAXATION OF MANUFACTURERS. | Taxing of raw materials and stocks on hand. |
| 60-45 | Sept 26 | CONSTITUTIONAL LAW. | Whether the provision of Sec. 25, Art. V of the Constitution of 1945 regarding retirement age of judges applies to judges of the Probate Courts. |
| 61-45 | Mar 28 | MOTOR FUEL TAX. | Power to waive penalties and interest. |
| 61-45 | Apr 4 | OILS AND MOTOR FUEL. | Duty of whom to provide inspection and pay inspection fees. |
| 61-45 | May 2 | FEDERALLY POSSESSED PROPERTIES. | Immunity of governmental agencies and instrumentalities from paying motor fuel tax. |
| 61-45 | May 31 | MOTOR VEHICLE FUEL TAXES. | Naphtha when distilled and especially designed for use other than as a fuel for internal combustion engines, is not a motor vehicle fuel, and is, therefore, not subject to tax. |
| 61-45 | June 6 | MOTOR VEHICLE FUEL TAX. | Liability of political subdivisions of the State for payment of motor vehicle fuel tax, under the Constitution of 1945. |
| 61-45 | July 6 | CONSERVATION COMMISSION. FISH AND GAME. | Section 54 of Wildlife and Forestry Code of Missouri 1944, construed. |
| 61-45 | Sept 25 | MOTOR FUEL USE LAW. | Gasoline as a motor fuel is not subject to a use tax under the Act of 1941, pages 448, 449, as amended in 1943, Laws of 1943, pages 657, 658. |
| 62-45 | Jan 19 | TAXATION. EXEMPTION OF CHURCH PROPERTY. | Church property liable for real estate taxes where lien for taxes accrues prior to transfer of the property to church use. |
| 62-45 | Feb 7 | CORPORATIONS. | Determination of date of organization within the provisions of Sec. 5113, R. S. Mo. 1939, as amended, Laws of 1943, p. 406. |
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| 62-45 | Mar 29 | Hon. Roy D. Miller | WITHDRAWN |
| 62-45 | Mar 30 | DESCENTS & DISTRIBUTION. | Right of illegitimate children to inherit. |
| 62-45 | Apr 10 | CONSTITUTIONAL LAW. MAGISTRATES. | Under new Constitution magistrate may not draw compensation for performing other public duties. |
| 62-45 | Apr 30 | Hon. Jesse A. Mitchell | WITHDRAWN |
| 62-45 | May 3 | NEW CONSTITUTION. | Section 8, Article 6 construed. |
| 62-45 | May 4 | NON-PROFIT CO-OPERATIVE CORPORATIONS. | Such corporations are not required by law to file annual corporation franchise tax report. |
| 62-45 | Nov 30 | TAXATION AND REVENUE. | Jurisdiction of county court to abate merchant's tax. |
| 62-45 | Dec. 10 | BUDGETS. | Budgets of counties of less than fifty thousand population are based on the valuation for 1945. |
| 64-45 | Apr 11 | GENERAL ASSEMBLY. LEGISLATOR. | Members of General Assembly ineligible for appointment to office of City Attorney of city of the fourth class. |
| 64-45 | June 8 | FEDERAL LAND BANK BONDS AND OTHER BONDS NAMED IN SECTION 7952, LAWS OF MISSOURI, 1943, PAGE 995. | Bonds insured by Federal Housing Administrator pursuant to National Housing Act must also be guaranteed as to principal and interest by the Government of the United States, otherwise they are subject to the restrictions of sub-section 1, of said Section 7952. |
| 64-45 | June 25 | SPECIAL ROAD DISTRICTS. COUNTY COURT. | Special road district created under Article 11, Chapter 46, R.S. Mo. 1939, cannot pay for initial cost of incorporation, neither can county court pay for same. Special road district entitled to money held by treasurer from levy on property in district, upon timely application. |
| 64-45 | Sept 17 | SMALL LOAN COMPANIES. LOAN AND INVESTMENT COMPANIES. | Commissioner of Finance authorized by statute to supervise advertising. |
| 64-45 | Oct 4 | GENERAL BUSINESS CORPORATIONS—SELECTION OF CORPORATE NAME. | A general business corporation organized to handle loans and mortgages may not use the word “bank” in its corporate name under sub-paragraph (b), Sec. 7, of the Corporations Act, Laws of Missouri, 1943. |
| 64-45 | Oct 20 | BANKS – INCREASE | The 60 days' notice required by Sec. 7973, Laws of Mo., 1941, page |

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| | | OF CAPITAL STOCK. | 672, is not necessary, preliminary to the increase of the capital stock of a bank, when all the stockholders of the bank waived in writing the publication thereof, and the records of such bank contain such waiver. |
| 66-45 | Jan 17 | ASSESSORS. | Fees to be allowed for taking farm crop census, under Sec. 14030, Art. 102, R. S. Mo. 1939, as amended, Laws of Mo., 1943, page 324. |
| 66-45 | July 2 | APPROPRIATIONS. | Constitutionality of appropriation for payment of premiums in connection with agriculture exhibits. |
| 67-45 | Jan 29 | LIQUOR CONTROL ACT. | Liquor licensee not required to be a voter and taxpayer of the county, town, city or village wherein he seeks the license, but he must be a resident of the State of Missouri. |
| 67-45 | Mar 9 | Hon. Wayne Norman | WITHDRAWN |
| 67-45 | Apr 26 | ROADS. | Special tax levied for cutting weeds and brush growing in road cannot be expended for any other purpose and must be levied in accordance with statute. |
| 67-45 | May 2 | TAXATION. | County courts must follow existing statutes until amended to conform to new Constitution. |
| 67-45 | May 16 | SPECIAL ROAD DISTRICTS. TOWNSHIP BOARDS. | Township boards are required to comply with Sec. 8821, R. S. Mo. 1939, in fixing maximum levy for road and bridge tax for 1945. |
| 67-45 | Aug 24 | JURY SERVICE OF WOMEN. | |
| 67-45 | Nov 20 | RECORDERS. | The appointment of additional help in the office of the Recorder of Deeds to record military service discharges. |
| 69-45 | Apr 17 | PHARMACY. | Person engaged exclusively in wholesale drug business is required to be registered pharmacist, or have registered pharmacist in his employ when he compounds or dispenses drugs in connection with his business. |
| 69-45 | May 24 | ELEEMOSYNARY INSTITUTIONS. | County court has no authority to deduct, from amounts due eleemosynary institution in year 1945, for overcharge made in previous year or years. |
| 69-45 | July 27 | Hon. W. R. Painter | WITHDRAWN |
| 69-45 | July 31 | ELEEMOSYNARY INSTITUTIONS. PATIENTS' FUNDS. PROBATE COURTS. | Disposition of patients' funds in the custody of stewards of State Hospitals. |
| 69-45 | Aug 24 | PENAL INSTITUTIONS. | Where inmates of the Intermediate Reformatory at Algoa have escaped and then sentenced to the Penitentiary, their sentences are concurrent. |

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| 69-45 | Sept 27 | ELEEMOSYNARY INSTITUTIONS. | Whether or not the full time plumber employed by the State Hospital No. 2 at St. Joseph, Missouri is exempt from the St. Joseph ordinance requiring a license for plumbers. |
| 69-45 | Oct 11 | APPROPRIATIONS. STATE ELEEMOSYNARY INSTITUTIONS. | Sections 2, 5, 6 and 7 of H.B. 270 of 63rd General Assembly invalid; President of Board of Managers of State Eleemosynary Institutions should disregard same. |
| 69-45 | Nov 2 | STATE ELEEMOSYNARY INSTITUTIONS. | A person previously a patient at a Kansas State Hospital for epileptics is not a proper charge for the state of Missouri in its state hospital for the insane. |
| 70-45 | Sept 12 | COUNTY COURTS. | (1) Cannot organize firm, partnership or corporation for purpose of operating convalescent home or poor farm; (2) may contract for care of poor with private individuals. |
| 71-45 | Nov 8 | COUNTY BUDGET AND COUNTY COURT. | May transfer unexpended balance to road and bridge fund and building fund after all outstanding warrants have been paid. |
| 72-45 | Jan 22 | OFFICIAL BONDS. | Bond of County Collector of the Revenue. |
| 72-45 | Jan 30 | OFFICIAL BONDS. | County Treasurer not required to furnish official bond for school moneys in counties under township organization, as in such counties respective township trustees are custodians of school funds. |
| 72-45 | Mar 5 | SPECIAL ROAD DISTRICTS. | Right to receive tax moneys in hands of township treasurer arising from road and bridge levies on land located within jurisdiction of special road district organized under Art. 18, Chap. 46, R. S. Mo. 1939.3 |
| 72-45 | June 22 | ADMINISTRATOR, NATIONAL COUNCIL OF DEFENSE. | Disposition of papers and reports to the Governor. |
| 72-45 | July 31 | Hon. J. A. Purdome | WITHDRAWN |
| 72-45 | Sept 26 | NEPOTISM. | One is guilty of violation of nepotism section when relationship exists between father and son, even when the appointee is to receive compensation from sheriff. |
| 73-45 | Feb 21 | COUNTY LITIGATION. | Lawsuits of county may be compromised if they do not release or partially release established indebtedness, liability or obligation due state or county. |
| 73-45 | Feb 23 | COUNTY COURT. PUBLICATION OF ANNUAL STATEMENT. | County Court may not dispense with publication of annual statement if any newspaper in the county will publish same for legal rate. |
| 73-45 | June 9 | Hon. W. Oliver Rasch | WITHDRAWN |
| 73-45 | June | COUNTY BUDGETS. | May be revised by no authority granted county court to donate county |

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| | 25 | | funds to city. |
| 73-45 | July 18 | MOTOR VEHICLE. | Under the facts stated the truck in question is a commercial motor vehicle. |
| 73-45 | Aug 8 | COUNTY COURT. | Not authorized to employ Abstracter to assist Assessor in making Assessor's Book. |
| 73-45 | Oct 19 | TAXATION AND REVENUE. | Construction of Art. X, Sec. 13, Constitution of 1945 with respect to publication of notice of sale of real property for delinquent tax in the year 1945. |
| 75-45 | Mar 14 | STATE DEPARTMENT OF RESOURCES & DEVELOPMENT. | Department does not have sufficient statutory authority to enable it to act in the capacity of an Airport Agency within the meaning of H. R. 5024. |
| 75-45 | Oct 25 | JUSTICE OF THE PEACE. | Jurisdiction in preliminary hearings under the Constitution of Missouri, 1945. |
| 76-45 | Apr 16 | COUNTY SCHOOL BONDS. | Such bonds are not negotiable. |
| 76-45 | June 8 | CRIMINAL COSTS. | Payment of Prosecuting Attorney's fees on dismissal of cause. |
| 76-45 | June 25 | TAXATION AND REVENUE. | Method of adding omitted property to assessment rolls. |
| 76-45 | Oct 9 | MOTOR VEHICLES. | Person moving to this State from another state with intention to become a resident of this State and using foreign registered motor vehicle in connection with business in this State, should register motor vehicle in this State. |
| 76-45 | Nov 29 | TAXATION AND REVENUE. | Right of owner of real property sold for delinquent taxes to redeem without reimbursing purchaser at tax sale for repairs made prior to expiration of redemption period. |
| 77-45 | Sept 12 | COUNTY COURT. | Grant by the County Court of one thousand (\$1,000) dollars or more to the American Legion Post of Vienna, Missouri, for the erection of a building in which to hold American Legion meetings. |
| 77-45 | Nov 9 | TAXATION AND REVENUE. | Owner of pinball machines and music boxes not assessable as a merchant under Section 11303 and Section 11305, R. S. Mo. 1939. |
| 78-45 | Jan 30 | PROBATE JUDGES. | Disposition to be made of fees earned prior to but collected subsequent to effective date of Sec. 13404a, Laws of 1943, page 868. |
| 78-45 | Feb 6 | SCHOOLS. | Tuition cannot be paid for negro students attending college outside of Missouri for courses beyond those offered at the University of Missouri. |
| 78-45 | May 17 | SCHOOLS. | County court cannot annex unorganized territory, under Sec. 10409, R. |

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| | | | S. Mo. 1939, where there are more than twenty pupils of school age within such unorganized territory. |
| 79-45 | May 24 | TOWNSHIP ORGANIZATION. | Townships may not divide among special road districts a surplus of taxes remaining after township expenses have been paid; that such townships may legally issue warrants in any year against anticipated taxes for that year. |
| 79-45 | July 26 | DRAINAGE DISTRICT FUNDS. | Drainage District funds may not be invested in United States securities or any other securities. |
| 80-45 | Aug 20 | LINCOLN UNIVERSITY. | The provision in House Bill #361 passed by the 63rd General Assembly does not restrict the use of money appropriated for the tuition of students in out-state institutions to those institutions which are tax-supported. |
| 82-45 | Feb 12 | ELECTIONS. | Judges and clerks appointed to serve at the special election to be held Feb. 27, 1945, on the question of adopting a new Constitution, can also serve in the same capacity at a special election to fill the office of State Senator to be held in Adair, Macon and Shelby Counties on the same date. |
| 82-45 | Dec 6 | CORPORATIONS. | Products of foreign corporations may be subject to state inspection laws although sold in interstate commerce. |
| 83-45 | Jan 23 | TAXATION. ROAD DISTRICT. SPECIAL BENEFIT DISTRICTS. | Levy may be made by County Court up to fifty cents on one hundred dollars valuation when authorized by a majority of the qualified voters of the road district, under the provision of Sec. 23 of Art. X of the Constitution. |
| 83-45 | Jan 24 | COUNTY COURT. COUNTY BUDGET. | May expend county court funds to repair and construct bridges in special road districts, but only out of Class 6 of the County Budget Law. |
| 83-45 | Feb 19 | PROBATE COURTS. STENOGRAPHIC SERVICES. | When stenographic services may be provided; same person may act as clerk in probate court and stenographer if services as clerk are paid for by probate judge himself. |
| 83-45 | Feb 21 | OFFICERS. ANNUAL SALARY. COUNTY CLERK. | Annual salary of county clerk is based upon term year and not upon calendar year, payable in twelve monthly installments. |
| 83-45 | Feb 27 | INCOME TAX. | Construction to be placed on the phrase "head of a family" as used in Section 11351, R. S. Mo. 1939. |
| 83-45 | Feb 27 | INCOME TAX. | Procedure to be followed by State Auditor in estimating original or additional income tax of members of the armed forces and certain civilians. |
| 83-45 | Feb 27 | PROBATE JUDGES. | Fees earned prior to November 23, 1943, belong to the then incumbent of the office without regard to actual date of collection. |

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| 83-45 | Mar 21 | STATE BARBER BOARD. | Not authorized to examine applicant unless applicant has had training under licensed instructor. |
| 83-45 | July 6 | Hon. Forrest Smith | WITHDRAWN |
| 83-45 | July 30 | DELINQUENT TAX LAND SALES. | Purchase price paid at invalid sale may be refunded to purchaser. |
| 83-45 | Aug 13 | CONSTITUTIONAL LAW. LEGISLATION. | Secs. 29 and 52, Art. III, Constitution of 1945, must be read together in determining effective date of bills. Emergency clauses in H.B.s 244, 255, 264, 63rd General Assembly invalid. H. B. 244 will not increase salary effective, but can increase salary of deputy clerks. H.B.s 255 and 264 operative as soon as effective. |
| 83-45 | Aug 14 | STATE PURCHASING AGENT. | The State Purchasing Agent is unauthorized to trade in old equipment for new or better equipment. |
| 83-45 | Aug 22 | HABEAS CORPUS. | Effect of discharge on habeas corpus upon costs to be paid by state in subsequent proceedings against the same defendant. |
| 83-45 | Oct 17 | SALARIES. LIEUTENANT GOVERNOR. | Salary of Lieutenant Governor of the State of Missouri. |
| 83-45 | Oct 18 | TAXATION. SERVICEMEN. | Taxpayers engaged in the military service exempt from the payment of penalties on delinquent state and county real estate and personal taxes. |
| 83-45 | Oct 26 | SCHOOLS. | Present statutes concerning bond issues are in conflict with Constitution of 1945 and govern until July 1, 1946. |
| 83-45 | Oct 27 | SHERIFFS. DEPUTY SHERIFFS. WITNESS FEES. | Sheriffs and deputy sheriffs not allowed witness fees in criminal cases, unless they reside five miles or more from place of trial; not allowed witness fees in court upon which they attend. |
| 83-45 | Oct 29 | TAXATION. | Lien of city for delinquent taxes on property is on a par with that of county. |
| 83-45 | Nov 3 | APPROPRIATION BY GENERAL ASSEMBLY. | Appropriation to the Board of Trustees of Public School Retirement System of Missouri is constitutional as being made for a state purpose. |
| 83-45 | Nov 9 | CONSTITUTIONAL LAW. LEGISLATION. | Sections 29 and 52, Art. III, Constitution of 1945, must be read together in determining effective date of bills. Emergency clauses in S. B. 85, 86 and 87, 63rd General Assembly invalid. Said bills will be effective to increase the compensation of persons serving at the time said bills become effective. |
| 83-45 | Dec 11 | CRIMINAL COSTS. | Costs accrued after remand of convict by the Circuit Court of Cole County to the county in which criminal charges are pending against him. |

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| 84-45 | Apr 25 | Hon. George A. Spencer | WITHDRAWN |
| 84-45 | Apr 27 | Hon. George A. Spencer | WITHDRAWN |
| 84-45 | Oct 3 | OFFICERS. | May recover money expended for necessary extra clerk hire. |
| 85-45 | Jan 4 | Dr. James Stewart | WITHDRAWN |
| 85-45 | Jan 25 | BOARD OF HEALTH. REVOCATION OF LICENSE. | Soliciting patronage by agents does not include advertising. |
| 85-45 | Jan 26 | Dr. James Stewart | WITHDRAWN |
| 85-45 | Nov 7 | Hon. Jackson C. Stanton | WITHDRAWN |
| 89-45 | May 3 | CONSTITUTION. | Applicability of Sec. 11, Art. X, Constitution of 1945 with respect to maximum levies which may be made by cities of less than 10,000 population for the year 1945. |
| 89-45 | July 11 | CONSOLIDATED SCHOOL DISTRICTS. | Funds of such district cannot lawfully be used to purchase a residence for the Superintendent of Schools of such district. |
| 89-45 | Oct 31 | SCHOOLS. | Blind children must attend the Missouri School for the Blind if proper local education is not provided. |
| 89-45 | Nov 17 | CRIMINAL LAW. | Excessively punishing a child, by beating and starving, by persons exercising care and control of the child makes such persons subject to prosecution under Sections 4419 and 4410, R.S. Mo. 1939. |
| 89-45 | Dec 17 | SUPERINTENDENT OF SCHOOLS. QUO WARRANTO. SALARIES. | Under Sec. 10617 R.S. 1939, it is mandatory that the County Superintendent of Schools shall not teach school during his term of office. He is subject to ouster if he continues to teach school; however, he is entitled to the salary of the office during his term of office. |
| 93-45 | Jan 26 | COUNTY OFFICERS. | Induction into the Armed Forces does not create vacancy in office. |
| 93-45 | Mar 2 | Hon. Hugh Waggoner | WITHDRAWN |
| 93-45 | Mar 19 | SCHOOLS. | County school fund cannot be invested in Government bonds and other securities prior to July 1, 1946, unless before said date the Legislature repeals or modifies Sec. 10376, p. 880, Laws of 1943. |
| 93-45 | Apr 12 | MOTOR VEHICLES. | Chauffeur's license not required of nonresidents holding valid chauffeur's license from home state or country. |
| 93-45 | Apr 30 | TAXATION AND REVENUE. | Maximum levies permitted for county and township revenue and township road and bridge purposes, under the Constitution of 1945. |
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| 93-45 | Aug 8 | MOTOR VEHICLES. | Unlawful to use red lights on front of vehicle without special permission; not unlawful to use sirens. |
| 93-45 | Aug 30 | DISPOSITION OF STOLEN PROPERTY. DISPOSITION OF ILLEGAL PROPERTY. | In possession of police officers. |
| 93-45 | Sept 7 | MOTOR VEHICLES. | Motor scooter is a motor vehicle; must be registered and licensed, and driver's license law applies to persons operating same. |
| 93-45 | Oct 17 | COUNTY TREASURER. | Should not pay surplus arising from sale of land for taxes to grantee in quitclaim deed from former owner unless deed contains provisions transferring right to claim surplus. |
| 93-45 | Oct 29 | OFFICERS. | Peace officers have jurisdiction only in districts for which they were appointed or elected. |
| 93-45 | Dec 6 | COUNTY COURT DRAINAGE DISTRICTS. | 1) The County Court has no authority to employ attorneys to resist the collection of taxes levied by such County Court against property in a County Court Drainage District. 2) The County Collector may employ an attorney to collect delinquent drainage tax at the fees to be allowed by the Circuit Court, as compensation, under Section 12417, R.S. Mo. 19393. |
| 94-45 | Jan 8 | COUNTY POLITICAL PARTY COMMITTEE. | A majority of the county committee, when duly called and acting has right to transact all business for entire body. When committee fails to have quorum, any action except that of adjournment is not binding. |
| 94-45 | Feb 13 | ACCOUNTANCY. | Right of person not registered as public accountant or certified public accountant to make out state and federal income tax returns. |
| 96-45 | May 31 | CRIMINAL LAW. | Discussion of sentences to Intermediate Reformatory and transfer to Penitentiary. |
| 96-45 | Aug 17 | Mr. T. E. Whitecotton | WITHDRAWN |
| 96-45 | Aug 29 | PENITENTIARY. | Prosecution of escapes and payments of rewards for apprehension and delivery of escapees. |
| 96-45 | Aug 30 | CONVICTS. | Convicts released under Section 9086, R.S. Mo. 1939 – 9/12 service of sentence. |
| 96-45 | Oct 5 | COUNTY. | To pay for support and maintenance of boys under seventeen years of age, committed to the Missouri training school for boys. |
| 97-45 | Apr 27 | TAXATION AND REVENUE. | Construction of Sec. 3, Art. X, and Sec. 23, Art. IV, Constitution of Missouri of 1945, and of Secs. 2 and 5 of the Schedule appended thereto. |
| 97-45 | May 23 | COUNTY. | Liability for costs in prosecution of driving motor vehicle while |

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| | | CRIMINAL. COSTS. | intoxicated upon acquittal. |
| 97-45 | May 28 | GAMBLING. | Setting up or using punch boards violate the provisions of Section 4678, R. S. Mo. 1939. |
| 97-45 | Oct 2 | CRIMINAL LAW. | Civil courts of this state have jurisdiction to try military personnel for offenses against the civil laws of Missouri. |
| 97-45 | Oct 12 | WEAPONS. | State of Missouri does not require registration of pistols, revolvers or other firearms. |
| 98-45 | Jan 16 | INHERITANCE TAX. | Liability of the estate of a deceased soldier for payment of Missouri Inheritance Tax. |
| 98-45 | May 31 | CONTRACTS OF STATE TREASURER AND STATE DEPOSITORY WITH CUSTODIAN OF SECURITIES. | Form and provisions of contracts found to comply with the statutes of Missouri. |
| 98-45 | Aug 4 | STATE TREASURER. | Payment to State of Missouri by U. S. treasurer under provisions of 26 Stat. L., 417, 418, and 49 Stat. L., 436, 439, should be deposited in Seminary Fund. |
| 98-45 | Aug 6 | APPROPRIATION OF LICENSE FEES PAID BY MOTOR VEHICLES OF MISSOURI TO COUNTIES, ROAD DISTRICTS AND CITIES UNDER SECTION 5728, EXTRA SESSION, LAWS OF 1944. | Counties, road districts and cities must file claim for its share of such funds with the State Auditor who shall issue warrant therefor to the State Treasurer who may then pay the same. |
| 99-45 | Mar 15 | PUBLIC SERVICE COMMISSION. MOTOR VEHICLES. | Public Service Commission does not have power to license and regulate a nonresident who owns and operates a store in neighboring state and regularly operates his own truck within the State of Missouri for the purpose of obtaining goods and supplies to be sold in his place of business in another state. |
| 99-45 | Apr 18 | CONSTITUTIONAL LAW. PROBATE JUDGE. | Probate Judge unlicensed to practice law may succeed himself in office and be magistrate. |
| 99-45 | Sept 28 | COUNTY COURT. | Proceeds of sale of county farm should be returned to general revenue fund of the county. |

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| 99-45 | Oct 18 | CORONERS. EMPLOYEES OF STATE CANCER HOSPITAL. | May not order autopsy except in connection with inquest. Not prohibited from performing autopsies for county coroners. |
| 99-45 | Nov 7 | COUNTY COURTS. | The erection of cattle guards on county roads. |

CONSTITUTIONAL ELECTIONS: County Courts cannot consolidate election precincts for the constitutional election February 27, 1945.

January 2, 1945



Honorable H. D. Allison
County Clerk
St. Joseph, Missouri

Dear Sir:

We have your letter of recent date in which you submit the following for our opinion:

"The Buchanan County Court would like to have an opinion on whether or not section 11482a, page 551, Election Laws Revised 1943-44 would apply to the coming election on the adoption of the new proposed constitution.

"In other words, the County Court are desirous of knowing whether or not they have the power to consolidate election precincts in the coming election. If so, it will save considerable money to the County and the County Court are at this time making appropriations for the 1945 budget. For that reason they are anxious to receive your opinion in this matter as soon as possible."

Section 3 of Article XV of the Constitution of Missouri deals with the calling of elections for constitutional conventions and with various questions concerning the proceedings and actions of such a convention. Among other things, said Article provides as follows:

"* * * Any proposed Constitution or constitutional amendments which shall have been adopted by such convention shall be submitted to a vote of the electors of the state in such manner and containing such separate and alternative propositions and on such official ballot as may be provided by

such convention, at a special election, on a day to be therein fixed, not less than sixty days nor more than six months after the adjournment of the convention. * * * * *

By the foregoing provision the Constitutional Convention, which has recently adjourned, had the right to determine the manner the proposed new Constitution should be submitted to the voters. That Convention, in pursuance to the foregoing authority, provided that the new Constitution should be submitted at a special election to be held on Tuesday, February 27, 1945. Said convention further provided in the ordinance which prescribed the manner of holding the special election as follows:

"* * * Said election shall be held and said qualified electors shall vote at the usual places of voting at general elections in the several counties of this State, including the City of St. Louis; and, except as herein otherwise provided, said election shall be conducted and returns thereof made according to the laws in force on said date regulating general elections; provided, that it shall not be necessary to hold said election with booths for the voters, and that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two Parties which cast the highest and next highest number of votes for Governor at the last general election. In cities and counties where registration of voters is now provided for by law said special election shall be held in accordance with the provisions of law now in effect applicable to the holding of general elections in said cities and counties, except that only one judge and one clerk shall be selected from each of the major Parties, as above provided."

It will be seen from the foregoing quotation of

January 2, 1945

the ordinance prescribing the manner of holding the special constitutional election that the "electors shall vote at the usual places of voting at general elections." Said ordinance also provides that the election shall be conducted according to the laws in force regulating "general election," with certain exceptions. In view of the fact that the constitutional convention had the authority to determine the manner in which the new Constitution should be submitted to the people, and in view of the fact that the said Convention provided that the voters should vote at the places of voting at the general election in the several counties, we must conclude that it is necessary that the precincts which are used at general elections in such counties must also be used in the special election which is to be held on February 27, 1945.

Section 11482a, page 551, Laws of 1943, authorizes county courts to consolidate precincts or election districts "in any special election for the election of delegates to a Constitutional Convention or any constitutional amendment." Whether the Legislature, by said section, intended to include a special election upon a proposed new Constitution is not clear. However, as pointed out above, the authority for controlling the manner of submitting a new Constitution to the people is vested in the Constitutional Convention itself and that Convention has prescribed that the voting shall be at the places used in general elections.

CONCLUSION

It is, therefore, the opinion of this office that the county courts cannot consolidate election precincts for the special election to be held February 27, 1945, at which a new proposed Constitution will be submitted to the voters but that said election must be held at the usual places of voting at general elections in said counties and in the City of St. Louis.

Respectfully submitted

APPROVED:

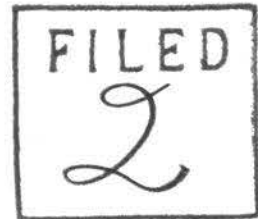
GEORGE W. CROWLEY
Assistant Attorney General

HARRY H. KAY
(Acting) Attorney General

SCHOOL DISTRICT TAXES:

Changes in New Constitution will have no effect on the present school year's income. The assessment now being made on merchants' and manufacturers' will be available for the fiscal school year of 1945-1946.

August 4, 1945



Honorable Morris Anderson
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Anderson:

This will acknowledge your letter of July 16,
which is as follows:

"I would appreciate it if your office would advise me, in order that I may have more definite information, in regard to the revenue that the Hannibal School Board derives from the local school tax rates on assessed property of the school district.

"(A). What effect will the changes being brought about in the new Constitution have on the present year's income?

"(B). Will the assessment now being made on merchants and manufacturers be available for the fiscal school year of 1945-1946?"

Section 2 of the Schedule of the New Constitution is as follows:

"Section 2. All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this

Constitution, shall remain in full force and effect until July 1, 1946."

Article 2, Chapter 72, R. S. Mo. 1939, contains the laws of this State applicable to all classes of schools. Section 10347, of said Article and Chapter, directs how and when the estimate for the levying and collection of school taxes shall be made. Said Section is as follows:

"The board of directors of each district shall, on or before the fifteenth day of May of each year, forward to the county superintendent of schools an estimate of the amount of funds necessary to sustain the schools of their district for the time required by law, or, when a longer term has been ordered by the annual meeting, for the time thus decided upon, together with such other amount for purchasing site, erecting buildings or meeting bonded indebtedness, and interest on same, as may have been legally ordered in such estimate, stating clearly the amount deemed necessary for each fund, and the rate required to raise said amount."

It should be observed that said Section 10347, supra, requires the rate to be fixed required to raise said amount. This, we think, has a definite and vital relationship to the valuation of property upon which the rate when fixed applies which will be hereinafter considered.

Section 10395 of said Article 2, Chapter 72, prescribes the duties of the County Clerk upon receiving the estimates required by said Section 10347. Said Section is as follows:

"On receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in said district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district

August 4, 1945

of the amount of goods, wares and merchandise owned by them and taxable for state and county purposes: Provided, that the levy thus extended shall not exceed in any one year as follows: For building purposes, one per centum in town school districts, and not more than sixty-five cents on the one hundred dollars in other districts; for sinking fund, forty cents on the one hundred dollars' valuation, and a sufficient amount to pay interest on bonded indebtedness; all of which shall be expended by the county clerk upon the general tax books of the county for said year in separate columns arranged for that purpose; and the county clerks shall list the names of all persons owning any personal property who do not reside in any school district, and the value thereof; also, list all lands and town lots in any territory not organized into a school district, and shall levy a tax of forty cents on the one hundred dollars' valuation on all such taxable property, said taxes to be collected as other taxes and distributed as provided in section 10390; and it shall be the duty of the county assessor in listing property to take the number of the school district in which said taxpayer resides at the time of making his list, to be by him marked on said list, and also on the personal assessment book, in columns provided for that purpose."

It will thus be observed that the estimate must be prepared and given to the County Clerk by May 15, of each year. The County Clerk then assesses the tax on the valuation as shown by the last annual assessment for State and County purposes for taxes for the ensuing school year.

The fiscal year for the assessment of taxes under existing statutes in this State is fixed by Sections 10940 and 10970, R.S. Mo. 1939, which are respectively, as follows:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

Section 10970:

"Real estate shall be assessed at the assessment which shall commence on the first day of June, 1893, and shall be required to be assessed every year thereafter."

Our Supreme Court in construing Section 10970, which must be read along with Section 10940, as fixing a taxable or fiscal year beginning on the first day of June each year, and in holding that a valuation fixed in a prior fiscal year cannot be changed, in the case of the St. Joseph Lead Co. vs. Simms, et al., 108 Mo. 222, (at the time said case was decided, real estate was assessed every two years), l.c. 225, 226, said:

"As section 7517 makes it the duty of the county board of equalization to meet on the first Monday of each year, it is, therefore, claimed that the board has the right and power to equalize the values of real estate at any annual meeting, especially so in view of the general words of the succeeding section. This is an entire misconception of the meaning of the statute. The assessment of real estate takes place but once every two years. The assessment thus made becomes the basis of taxation for the next two years. In the case in hand the assessment of real estate beginning on June 1, 1889, became the basis of taxation for the following two years. This is the assessment which was to be equalized at the annual meeting of the board held in April, 1890. The members of the board having taken the prescribed oath, it became their duty to hear complaints and appeals and to equalize the assessment. These duties were to be performed immediately, not a year thereafter; for such is the plain letter of the law.

* * * * *

"Having met and performed their duties, their power over that assessment ceased. It became the fixed and established basis of taxation for two years as to the real property, and one year as to the personal property. No doubt the legislature might have provided for a readjustment of values on real estate every year, but it has not done so."

It will be observed that the fiscal year fixing the liability for taxes under Section 10940, supra, states that the taxes thereon shall be for the "ensuing" year. "Ensuing" is defined as an intransitive verb in Webster's New International Dictionary, definition 2, page 852, as:

"To follow as a consequence or in chronological succession; to result; as, an ensuing conclusion or effect; the year ensuing."

It will be noted that Section 3, supra, of Article X of the New Constitution states, in part, as follows:

* * * "All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed."

Said Section 3, further states that:

"Except as otherwise provided in this Constitution, the methods of determining the value of property for taxation shall be fixed by law."

This brings us to the consideration of the conflict between the present laws, Sections 10940 and 10970, fixing the beginning of a fiscal or taxable year, and to the consideration of the valuation of property already fixed by present statutes under the estimate for school taxes provided in Section 10347, supra, and the new fiscal year as fixed by said Section 3, Article X of the New Constitution. It is believed that said Section 3 itself requires new general laws to be enacted by the Legislature for valuation of property for taxation, to change the fiscal year, and to

require that taxes be paid during the fiscal or calendar year in which the property is assessed for tax.

"Fiscal" is defined as an adjective in Webster's New International Dictionary, definition 3, page 955, as:

"Of or pertaining to the public treasury or revenue; hence, of or pertaining to financial matters generally."

Referring again to Section 2 of the Schedule of the New Constitution concerning the continuance in force of present laws, it is believed that the present laws and statutes above quoted, fixing the estimate, the assessment and valuation of property for school taxes, and fixing the fiscal year, and providing for the payment of taxes assessed in one year to be paid the ensuing year, must be held in full force and effect until July 1, 1946, unless sooner repealed or amended to conform with the New Constitution, and that such statutes and provisions herein referred to and quoted as are not in conflict with the New Constitution will remain in full force and effect until amended or repealed by the General Assembly. It appears that Sections 10940 and 10970, supra, are in conflict with said Section 3, Article X of the New Constitution which fixes the fiscal year in which property is assessed, as the calendar year for tax purposes, but in our view, both of said Sections 10940 and 10970 will remain in force until July 1, 1946, unless sooner amended or repealed by legislative action.

Section 5 of the Schedule of the New Constitution reads as follows:

"All rights, claims, causes of action and obligations existing and all contracts, prosecutions, recognizances and other instruments executed or entered into and all indictments which shall have been found and informations which shall have been filed and all actions which shall have been instituted and all fines, taxes, penalties and forfeitures assessed, levied, due or owing prior to the adoption of this Constitution shall continue to be as valid as if this Constitution had not been adopted."

August 4, 1945

It will be observed that Section 5 and Section 2, supra, of the Schedule of the New Constitution should be read together in determining the effect such constitutional provisions have upon taxes already estimated and assessed for school purposes. Section 5 supplements the terms of said Section 2 as to taxes assessed under statutes in force at the time of the taking effect of the New Constitution. Section 2 providing that all laws in conflict with the New Constitution shall remain in force and effect until July 1, 1946, and Section 5 providing that all taxes assessed or levied under such statutes prescribed, which still remain in force under Section 2, shall be as valid as if the New Constitution had not been adopted, means that there will be no change, at least until July 1, 1946, unless statutes be sooner amended or repealed, in the income and taxes of school districts for the present year, and that the taxes under present assessment and levy thereof, will not be available for the fiscal school year of 1945-1946.

This view of the statutes cited and quoted respecting the fiscal year, and our conclusions thereon, is supported, we believe, by the case of Mary V. K. DeGiverville vs. Legg, 48 Mo. App. 573, l.c. 575, 576 and 577, where the St. Louis Court of Appeals in rendering said decision, said:

"The plaintiff contends that the words, 'taxable year 1890,' ought to have been construed by the circuit court to mean the calendar year of 1890, thereby making the defendant liable for fifteen-twenty-fourths of the taxes: whereas the defendant's contention is that the words mean a fiscal or taxable year, and that, as the taxable year of 1890 ended on the first day of June, 1890, and his lease began on May 15, he was only liable for one-twenty-fourth of the taxes. * * * "

* * * * *

"But, in our opinion, the writing is without ambiguity. There is such a thing in this state as a taxable year, about which there can be no controversy, when the statutes concerning the assessment and collection of the public revenue are considered. Section 7569, Revised Statutes of 1889, reads: 'Every person owning or holding property on the first day

of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year.' Sec. 7552. * * * "

Section 11305, Article 18, Chapter 74, R. S. Mo. 1939, provides that merchants shall pay ad valorem tax equal to that which is levied upon real estate on the highest amount of merchandise on hand between the first Monday in March, and the first Monday in June of each year.

Section 11309, provides that a merchant's tax shall be assessed upon a statement filed by such merchant on the first day of June of each year as is provided in Section 11305. It is the duty, under this Section, of the County Assessor to enter such statements in a book prepared for that purpose, with columns for the name of the merchants, amount of their merchandise, the valuation for State, County, and school taxes. Said book must then be returned by the Assessor to the Board of Equalization which is required to meet on the first Monday in September of each year to equalize the valuation of merchants' statements, and after the work of the Board of Equalization has been completed, the County Clerk shall extend the taxes on such book, and on or before October 1, thereafter, make out and deliver to the Collector of the County, a copy of such book, properly certified, and take the receipt of the Collector therefor. This Section does not in terms require the County Collector to collect merchants' taxes during the same year. That part of Section 11309 applicable here, is as follows:

"* * * After the county board of equalization shall have completed the equalization of such statements, the clerk of the county court shall extend on such book all proper taxes at the same rate as assessed for the time on real estate, and he shall, on or before the first day of October thereafter, make out and deliver to the collector a copy of such book, properly certified, and take the receipt of the collector therefor, which receipt shall specify the aggregate amount of each kind of taxes due thereon, and the clerk shall charge the collector with the amount of such taxes; * * * "

But Section 11079, Article 8, Chapter 74, R. S. Mo. 1939, requires the County Collector in each County in this

August 4, 1945

State immediately after the receipt of the tax books of their respective counties, to proceed at once to collect such taxes. That part of said Section 11079, so providing, is as follows:

"It shall be the duty of the collectors of revenue of the several counties of the state, immediately after the receipt of the tax books of their respective counties, to give not less than twenty days' notice of the time and place at which they will meet the taxpayers of their respective counties, and collect and receive their taxes; * * *

Section 10942, provides that merchants' and manufacturers' taxes which constitute a class separate and distinct by itself, reads as follows:

"For the purpose of state, county and municipal taxes, merchandise held by merchants, and the raw material, merchandise, finished products, tools, machinery and appliances used or kept on hand by manufacturers shall constitute a class separate and distinct."

That the intention of the Legislature to require - merchants' and manufacturers' taxes to be collected in the same year that they are assessed as distinguished from general taxes which have always been assessed in this State as of June 1, and collected the following or ensuing year, was mentioned in the case of State ex rel. School District vs. Hackmann, 294 Mo. 190, where the Supreme Court was considering the question of the assessment and collection of merchants' and manufacturers' taxes was to be carried out before the completion of the assessment on the other property. The Court in said case, l.c. 195, in holding that merchants' and manufacturers' taxes are collectable during the year when assessed, said:

"* * * The merchants' and manufacturers' assessments made in 1920 as completed, so far as they are concerned, were completed in September, but the remainder of the 1920 assessment was not completed until 1921. The same thing is true of the assessment of 1921. The fact that the merchants' and manufacturers' taxes

August 4, 1945

were collected more promptly than the rest does not affect the question. It remains true that, whether these taxes are collected or not, the assessments on which they are based do not become a part of a completed assessment until the whole assessment is completed. * * * "

These statutes respecting the collection of merchants' and manufacturers' taxes as they now stand in our Revised Statutes come within the terms of said Sections 2 and 5, supra, of our New Constitution, and will remain in force and effect unless sooner amended or repealed, until July 1, 1946.

CONCLUSION.

It is, therefore, the opinion of this Department that the changes brought about in the New Constitution will have no effect on the present year's income of Hannibal School District as to its school tax rates on assessed property of the school district.

That the assessment now being made on merchants' and manufacturers' property will be available for the tax to be paid for the fiscal school year of 1945-1946.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

MARRIAGE LICENSES: Duties of recorder of deeds in issuing marriage licenses to minors.

August 11, 1945

FILED

2

Honorable Morris Anderson
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

Reference is made to your letter dated August 7, 1945, requesting an official opinion upon a letter addressed to you by Eugene B. Poole, Recorder, Marion County, Missouri, and reading as follows:

"In the past, the recorder's office in Marion County, Missouri, has required that a guardian of a minor have written proof of his guardianship, from the Probate Court, before this office would recognize his consent to the marriage of said minor.

"Section 3370, Revised Statutes of Missouri, 1939, on this subject, says in part:

"'...No recorder shall issue a license authorizing the marriage of any male under the age of twenty-one years or any female under the age of eighteen years, except with the consent of his or her father, mother, or guardian, which consent shall be given at the time in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths...'

"I have two cases in hand upon which I must pass. A young man twenty years old, accompanied by his fiancée, also twenty, and his uncle who claims to be the boy's guardian,

August 11, 1945

has applied to me for a marriage license. The two young people were fortified with the proper health certificates and are observing the three day waiting period. The guardian has no written proof from the Probate Court showing his guardianship, and, under the law, he claimed he did not need it; that if I wanted it, I would have to get it myself from Judge Bigger.

"QUESTION: Is it necessary, under the statutes, that a guardian, in addition to giving 'consent at the time, in writing,' etc., also furnish written or other proof of guardianship?

"The second problem concerns an Illinois couple seeking a marriage license, under similar circumstances as set out above, the only difference being that the guardian was willing to furnish proof of his guardianship; but the status of an Illinois guardian giving his consent to a marriage license issued in Missouri is questioned.

"The question, of course, in this case is: Has a guardian, who lives in a foreign state, the legal right to give consent to marriage of the minor in Missouri?

"In view of the provisions of the statute referred to above, another problem presents itself, although it has not yet materialized. The question arises under that portion of the statute which says, '... which consent shall be ... signed and sworn to before an officer authorized to administer oaths.'

"QUESTION: Can (or should) this office recognize a sworn statement, in granting ANY marriage license, where said statement was sworn to before any officer or person other than the recorder or one of his deputies?"

With respect to the first question proposed, we direct your attention to Section 3370, R. S. Mo. 1939, reading as follows:

"No recorder shall in any event except as herein provided issue a license authorizing the marriage of any person under fifteen years of age: Provided, however, that said license may be issued on order of the circuit or probate court of the county in which said license is applied for, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable, and no recorder shall issue a license authorizing the marriage of any male under the age of twenty-one years or of any female under the age of eighteen years, except with the consent of his or her father, mother or guardian, which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths. The recorder shall state in every license whether the parties applying for same, one or either or both of them, are of age, or whether the male is under the age of twenty-one years, or the female under the age of eighteen years, and if the male is under the age of twenty-one years or the female is under the age of eighteen years, the name of the father, mother or guardian consenting to such marriage."

Under the provisions of Section 3371, R. S. Mo. 1939, it is made a misdemeanor for any recorder to issue a marriage license to a minor contrary to the provisions of Chapter 20, R. S. Mo. 1939. Said section reads as follows:

"Any person who shall solemnize any marriage wherein the parties have not obtained a license, as provided by this chapter, or shall fail to keep a record of the solemnization of any marriage, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars, and in addition shall be subject to a civil action by the parent, guardian or other person having care or custody of the person so married,

August 11, 1945

to whom services are due whersin the recovery shall not exceed the sum of five hundred dollars; and any recorder who shall issue a license contrary to the provisions of this chapter shall be subject to a like punishment."

In view of the penalty attached to the issuance of a license contrary to these provisions, we believe that the recorder has the right to demand reasonable proof of the guardianship asserted by a person purporting to give his consent to the issuance of the license to a minor. Parenthetically, we might say that the same rule would apply to any person who claimed to be the parent of a minor seeking a license. Of course, if the recorder is satisfied that the person claiming to be the parent or guardian of the minor is actually such parent or guardian, he might well waive written proof of such parentage or guardianship, but, in the absence of such actual knowledge, we believe that it would be reasonable to require written proof of such parentage or guardianship.

As to the second question you propose, we direct your attention to 39 C. J. S., Guardian and Ward, par. 186, reading, in part, as follows:

"Generally, the authority of a guardian is limited to the state in which he is appointed, and he cannot exercise rights of guardianship elsewhere without obtaining letters of guardianship from the local tribunals, but his authority is sometimes recognized in other states on the principle of comity or by virtue of express statutory provision."

Further, par. 187:

"Under the principles of comity, the courts of a state may recognize the rights of a foreign guardian with respect to his ward even though a local guardian has been appointed."

We have been unable to find any decisions of the appellate courts of Missouri construing the rights of a foreign guardian with respect to the precise question you have proposed. However,

August 11, 1945

as indicative of a relaxation of the general rule, we do note that no provision has been made by the General Assembly for the appointment of a guardian in the State of Missouri unless the minor has either property in this state or is domiciled here. Further, under the provisions of Sections 416 and 417, R. S. Mo. 1939, recognition is given to the rights of foreign guardians and curators with respect to the transfer of the property and effects of nonresident wards without the necessity of such foreign guardians or curators having been supplemented by domiciliary guardians or curators.

We think from the above that for the purpose of giving consent to the issuance of a marriage license permitting the marriage of a minor, the authority of a foreign guardian may be recognized upon suitable proof of the existence of such guardianship being submitted.

We do call your attention to the fact that in some states guardians do not have authority to consent to the marriage of their minor wards. Necessarily, in each instance recourse must be had to the statutes setting forth the powers of guardians to ascertain whether or not such guardians do have such power to consent to the marriage of their minor wards within the state of their domicile. With reference to the particular case you have cited, we note from Chapter 83, Section 6, Ill. R. S. 1941, that guardians do have authority to consent to the marriage of their minor wards.

With respect to the third question you have propounded, we believe it is answered by the provisions of Section 1885, R. S. Mo. 1939, reading as follows:

"Whenever any oath or affirmation is required by law to be taken before a particular court or officer, the same may be done before any other court or officer empowered to administer oaths, unless it is expressly prohibited; and when no court or officer is named by whom an oath may be administered or affidavit taken, the same may be done by any court or officer authorized to administer oaths."

Further, we direct your attention to the provisions of Section 1884, R. S. Mo. 1939, reading as follows:

August 11, 1945

"Every court and judge, justice and clerk thereof, and all justices of the peace, shall respectively have power to administer oaths and affirmations to witnesses and others concerning any thing or proceeding depending before them, respectively, and to administer oaths and take affidavits and depositions within their respective jurisdictions, in all cases where oaths and affirmations are required by law to be taken."

In addition to the officers mentioned in the last quoted section, there are many other state, county and municipal officers authorized to administer oaths for specific purposes. Necessarily, if an application is presented which has been sworn to before a person other than the recorder or one of his deputies, it devolves upon the recorder to ascertain whether such officer actually had authority to administer such oath.

CONCLUSION

In the premises, we are of the opinion (1) that a recorder of deeds may reasonably require written proof of the guardianship of a person purporting to give consent to the issuance of a marriage license authorizing the marriage of a minor; (2) that a guardian of a minor domiciled in a state other than Missouri has the right to give his consent to the issuance of a marriage license authorizing the marriage of such minor, provided that such guardian is empowered with such authority in the state wherein he was appointed; and (3) that the oath required under the provisions of Section 3370, R. S. Mo. 1939, may be administered before any officer authorized to administer oaths.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

PAUPERS:

BURIALS:

CORONERS:

DEAD HUMAN BODIES:

Duty of coroner to bury dead body of pauper after inquest no longer exists; where body is claimed by relative, county where dead man resided has the duty to pay for burial expenses when he is buried and if wife has not the necessary means. Burial must be made at direction or with consent of the County Court.

October 25, 1945

FILED

2

Honorable Morris Anderson
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

Receipt is acknowledged of your letter dated October 9, 1945, in which you requested an official opinion of this office and which reads as follows:

"A controversy has arisen between the Counties of Ralls and Marion in regard to the expense account for the burial of a pauper. The County Clerk, Mr. J. E. Briscoe, desires a ruling upon the state of facts as contained in a letter to me.

"As you can plainly see my interpretation does not suit Ralls County, and Ralls County's interpretation does not suit Marion County, therefore, it is necessary to call upon you for an opinion in regard to the law.

"The letter containing the facts is as follows:

"The Ralls County Clerk has sent us a bill for the burial of a body found in the Mississippi River just across the Marion County Line, in Ralls County. The body was a Hannibal man and his wife claimed the body and brought it back to Marion County where James O'Donnell, Coroner of Marion County, buried it. The Coroner of Ralls County was called when the body was discovered and held an inquest, for which he charged Ralls County. The Ralls County Court says Marion County is liable for the burial expenses but the Marion County Court holds that since the body was found in Ralls County that they owe the funeral bill. Will you please tell us who is responsible for this bill?"

October 25, 1945

Section 13231, R.S. Mo. 1939, provides when a county coroner shall hold an inquest, and reads as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

(Emphasis ours.)

In your statement of facts you state that the body was found in the Mississippi River just across the Marion County line, in Ralls County and that when the body was discovered the coroner of Ralls County was called and he held an inquest. Consequently, it appears that the above quoted section was complied with.

Section 13245, R.S. Mo. 1939, provides when it is the duty for the county coroner to bury a dead body after an inquest has been held and how he shall be paid for burial expenses incurred. Said section is as follows:

"Whenever an inquest shall be held, if there be no relative or friend of the deceased, nor any person willing to bury the body, nor any person whose duty it is to attend to such burial, the coroner shall procure a cheap, plain coffin, and cause a grave to be dug and the body to be conveyed thereto and buried. It shall be the duty of the coroner, in so doing, to avoid all unnecessary expense, and to render to the court an accurate statement of all money expended by him for such purpose; and

the county court shall make to him a reasonable allowance for his actual expenses in procuring the coffin, hauling the body to the grave, digging the grave and burying the body; and also a reasonable allowance, according to the circumstances, for his own time and services in attending to such preparations and burial."

(Emphasis ours.)

Had the body been unclaimed, it would have been the duty of the Ralls County coroner to bury the body in the manner prescribed in the above quoted section. However, when the wife of the dead man claimed the body and removed the body to Marion County, the duty to bury the body was no longer with the Ralls County coroner. He was required to deliver the body to the wife, in accordance with Section 13245, supra.

For Ralls County to be liable for the burial expenses, it was necessary that the body be unclaimed and buried by the coroner of Ralls County, as provided in Section 13245, supra.

We assume that the reason the wife did not bury the body was because she lacked the funds to do so. Had she the necessary means, it would have been her duty to pay for the burial expenses of her husband. The husband did not have the necessary means to pay for his own burial, as you have stated in your letter that he was a pauper.

Section 9595, R.S. Mo. 1939, provides for funeral expenses to be paid by the County Court, and reads as follows:

"The county court of the proper county shall allow such sum as it shall think reasonable, for the funeral expenses of any person who shall die within the county without means to pay such funeral expenses."

Assuming the dead man was without means to pay for his funeral expenses, the remaining problem is to determine where the man died. Under the circumstances this may be difficult to do, but if he died in Marion County then that county would be liable for the burial expenses if the man was buried at the direction or with the consent of the Marion County Court. The County Court would have to pay the coroner a reasonable sum for the money he expended for the burial. If the coroner buried the body voluntarily, or if there was not subsequent consent to the burial given by the County Court, then there

October 25, 1945

is no liability on Marion County to pay for the burial expenses by reimbursing the coroner. See Duval v. Laclede County, 21 Mo. 396, from which the following is quoted at l.c. 397:

"* * * * Assuming that the deceased was a poor person of the county, and that the burial of the county poor, as well as their support during life, is embraced in the general duty to take care of them, * * * * it would be against all principle to allow the plaintiff voluntarily to discharge this duty for the county, and in this manner become its creditor, without its consent, for services rendered, or money expended, in taking care of its poor.

"Such volunteer acts create no obligation in any case, without a subsequent express promise, nor even then, unless the party sought to be charged, was under a legal obligation to do the act. * * * *"

If it is determined that the man died outside Marion County, then that county would have no authority to pay any one for the funeral expenses, because Section 9595, supra, provides that the person must die within the county. The exception to this would be the burial expenses paid by the County Court, as provided in Section 13245, supra.

To better protect the welfare of the people within the county, it is our belief that Marion County should recognize its general duty to take care of the poor people who reside in the county by assuming the nominal expense of their burial when they are buried within the county. It could well be done in this case by deciding that the man died in Marion County and was buried by the Marion County coroner at the direction or with the consent of the County Court. In this regard we think that the noteworthy language and reasoning appearing in the dissenting opinion of Duval v. Laclede County, supra, should be brought to your attention in the quotation taken from l.c. 398:

"* * * * For the sake of humanity, it intended that every man who would bury the decaying bodies of the poor,

October 25, 1945

should be paid. In such cases, there is no time to wait - there is no time to consult or ask advice, and therefore the law promises to pay anyone who will bury the body. If the law was such that the party would only be paid in the event the county court thought proper to do so, the dead body, in many cases, might go unburied, or buried in such a manner as would be a disgrace to humanity. * * * *

Conclusion.

Therefore, it is the opinion of this office that: (1) Where the county coroner has custody of a dead body after an inquest has been held, and the body is unclaimed by friends or relatives, the coroner must bury the body, as provided in Section 13245, R.S. Mo. 1939. The County Court will pay the coroner for expenses incurred; (2) when the body is claimed by the wife and removed to another county, the duty of the coroner to bury the body no longer exists; (3) where the body is buried by the coroner in a county other than where it was found, the county where the body was found is not liable for burial expenses; (4) the county will pay reasonable funeral expenses for a person dying within the county who has no means to pay for his burial; (5) a person who buries the body of one who died within the county must do so at the request or with the consent of the County Court, to be reimbursed for burial expenses, except as provided in Section 13245, R.S. Mo. 1939; (6) if a person dies outside of the county, the county is not liable for burial expenses, except as provided in Section 13245, R.S. Mo. 1939; (7) the moral duty is with the county to pay for the burial of its poor, and expenses could be paid by Marion County, in the instant case, by deciding that the man died in Marion County and was buried by the Marion County coroner at the direction or with the consent of the Marion County Court.

Respectfully submitted,

APPROVED:

RICHARD F. THOMPSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

RFT:ml

TOWNSHIP BOARDS: Township boards will be required to comply with the provisions of Section 8821, R. S. Mo. 1939, in fixing their maximum levy of tax for road and bridge purposes in the year 1945.

April 25, 1945

FILED

5

Honorable Emmett L. Bartram
Representative, Nodaway County
House Post Office
Jefferson City, Missouri

Dear Mr. Bartram:

Reference is made to your letter dated April 24, 1945, requesting an official opinion of this office, and reading as follows:

"When I was home last week-end the County Court of Nodaway County called me in for a conference in regard to Section 12 on Page 59 of the proposed New Constitution, also Section 11 on the preceding page, which they had written you about for an opinion a few weeks ago.

"The various township boards of our county, as our county has township organization, are making inquiry of them if they can run a thirty-five cent levy this summer for the collections of this year's taxes. They are now running a levy of twenty-five cents as provided in Section 8821, R. S. Mo., 1939.

"Your opinion explained these sections to them in part, but you did not give them an opinion on the question I have stated above. I told them I would take it up with you and if possible, have you give them an opinion on this point at your earliest convenience. If you desire, I will be glad to come over and discuss the matter with you."

April 25, 1945

Section 8821, R. S. Mo. 1939, to which you have referred in your letter, reads, in part, as follows:

"The township board of directors of any township may, * * * levy an annual tax in addition to those now authorized by law, in any amount not exceeding twenty-five cents on each one hundred dollars valuation on all property subject to taxation in such township, to be known as a special road and bridge fund: * * * "

Section 12 of Article X of the Constitution of 1945 reads, in part, as follows:

" * * * the township board of directors in the counties under township organization, * * * may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. * * * "

Upon comparison of these laws dealing with the same subject matter, it becomes apparent that a conflict exists with respect to the maximum levy which may be made by the township board of directors for the collection of a special road and bridge tax. In the premises, Section 2 of the Schedule appended to the Constitution of 1945, we think, becomes controlling. We quote, in part, from said Section 2:

" * * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

April 25, 1945

CONCLUSION

We, therefore, are of the opinion that in view of the conflict existing between the present statute relating to the maximum levy that can be made by township boards of directors for special road and bridge tax and the corresponding section of the Constitution of 1945, that the present existing statute imposing a limitation of twenty-five cents per one hundred dollars valuation will remain in full force and effect until July 1, 1946, unless sooner repealed or amended by the General Assembly; and that consequently, in fixing the maximum levy in 1945, the township boards of directors should not exceed the limitation found in Section 8821, R. S. Mo. 1939, in the absence of such amendatory or repealing action by the General Assembly.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION: Franchises must be taxed under Class 3 of Section 4, Article X, Constitution of 1945.



September 26, 1945

Honorable E. L. Bartram, Chairman
Taxation Revision Committee
of the General Assembly
Jefferson City, Missouri

Dear Sir:

Your request of August 20, 1945, presents the following question for our opinion:

In view of the provisions of Sections 4 and 5 of Article X of the new Constitution of Missouri, may the franchises of corporations be assessed for taxation in the same manner as other property of the corporation?

Under existing laws, franchises of corporations are taxed in the same manner as other property, under authority of Sections 11240 and 11241, R. S. Mo. 1939, and Section 11295, Laws of 1941, page 695. Your request mentioned these statutes and it is considered unnecessary to quote them herein.

Section 4, Article X, of the 1945 Constitution provides, in part:

"All taxable property shall be classified for tax purposes as follows: Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property. * * * Nothing in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of

excise or motor vehicle license taxes, or any other taxes of the same or different types.

" * * * Property in Class 3 and its subclasses shall be taxed only to the extent authorized and at the rate fixed by law for each class and subclass, and the tax shall be based on the annual yield and shall not exceed eight per cent thereof."

Further mention of franchises is found in Section 5, Article X, of the 1945 Constitution, in relation to railroad corporations, as follows:

"All railroad corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on the real and personal property owned or used by them, and on their gross earnings, their net earnings, their franchises and their capital stock."

Franchises are unquestionably intangible property, and the framers of the Constitution obviously intended to include them in Class 3, mentioned above in Section 4, for taxation purposes. If this view needed support, it could be readily found in the sentence which provides, "Nothing in this section shall prevent the taxing of franchises, * * *."

CONCLUSION

In view of the above, it is our conclusion that franchises may not be assessed for taxation in the same manner as other property of a corporation, under the 1945 Constitution of Missouri, but must be classified under Class 3 of Section

Honorable E. L. Bartram

-3-

September 26, 1945

4, Article X, and a tax imposed, based on the annual yield, not to exceed eight per cent of such yield, as provided in the 1945 Constitution.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

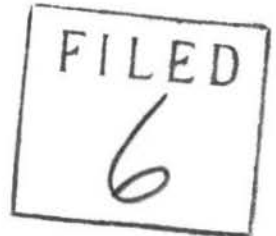
J. E. TAYLOR
Attorney General

RLH:HR

OFFICERS' COMMISSIONS: When proper commission was not delivered to Public Administrator by prior Governor and prior Secretary of State, same should be issued by the present Governor, properly attested by the present Secretary of State.

January 16, 1945

Honorable Wilson Bell
Secretary of State
Jefferson City, Missouri



Dear Sir:

In your recent request for an opinion from this office it is stated that the County Clerk of Boone County, Missouri, on December 8, 1944, duly certified to the former Secretary of State the election of Mr. Fred B. Beaven, as Public Administrator of Boone County, Missouri, on November 7, 1944. It is further recited that a commission was issued to Mr. Beaven by the then Governor of Missouri but was not signed by the then Secretary of State; that this commission was forwarded to the County Clerk, who returned it to the Secretary of State for his signature; that according to the records of the former Secretary of State the commission was then signed by him and mailed to the County Clerk of Boone County; and that, on January 10, 1945, the County Clerk informed you that the commission had not been returned to him. You submit the following question:

"At the request of Governor Phil M. Donnelly, I ask you for an opinion as to the legal manner to handle this matter."

Section 23 of Article V of the Constitution of Missouri provides:

"The Governor shall commission all officers not otherwise provided for by law. All commissions shall run in the name and by the authority of the State of Missouri, be signed by the Governor, sealed with the Great Seal of the State of Missouri, and attested by the Secretary of State."

Jan. 16, 1945

Section 12996, R. S. Mo. 1939, requires the Secretary of State to affix the seal of the state to and countersign all commissions required by law to be issued by the Governor.

Section 295, R. S. Mo. 1939, provides among other things that the public administrator shall give bond "approved by the court * * * which said bond shall be given and oath of office taken on or before the first day of January following his election."

Section 297, R. S. Mo. 1939, has the following provision:

"His certificate of election, official oath and bond shall be filed and recorded in the office of the clerk of said court, and copies thereof, certified under the seal of such court, shall be evidence. * * * * *

It is thus apparent that the Legislature has not "otherwise provided for" the commissioning of public administrators and that the duty devolves upon the Governor to issue such commissions. Adams v. Harper, 20 Mo. App. 684.

If it be true that a properly executed commission has not been delivered to the Public Administrator, then a commission for such office should be issued by the present Governor with the seal of the State of Missouri affixed thereto and countersigned by the Secretary of State.

CONCLUSION

It is, therefore, the opinion of this office that if a properly executed commission has not been heretofore delivered to the Public Administrator of Boone County, Missouri, such should be issued and delivered by the present Governor, duly attested by the present Secretary of State, to such official.

Respectfully submitted,

APPROVED:

VANE C. THURLO
Assistant Attorney General

HARRY H. KAY
(Acting) Attorney General

VCT:CP

CORPORATIONS: Secretary of State has no authority to revoke certificate of change of name of corporation.

April 27, 1945



Honorable Wilson Bell
Secretary of State
Jefferson City, Missouri

Attention: Mr. Russell Maloney
Corporation Supervisor

Dear Sir:

Reference is made to your letter under date of April 17, 1945, requesting an official opinion of this office, and reading as follows:

"In accordance with our telephone conversation, find enclosed correspondence relating to the Geo. Kilgen & Son, Inc., a Missouri corporation.

"The question that has arisen is whether or not the Secretary of State, having once filed articles of incorporation or amendments to articles and issued certificates in connection therewith, may nullify the issuance of such certificates, and if so, the manner in which this can be done.

"As the enclosed correspondence will show, the above named corporation was refused the right to use this name, but later through inadvertence the use of the name was granted by an amendment."

We are unable to find any reported decisions of the Missouri appellate courts directly deciding the question pro-

April 27, 1945

posed by your letter of inquiry. We necessarily must, therefore, answer your question by reference directly to the statutes applicable thereto.

In the granting of a certificate of change of name of a corporation, the Secretary of State exercises a discretion that cannot be controlled by mandamus. In *State v. McGrath*, 5 S. W. 2d 29, 92 Mo. 355, the effect of the decision was that the Secretary of State must exercise his discretion in determining whether a company asking of him a certificate of incorporation has adopted a name that is the same as, or an imitation of, that of an existing corporation, within the prohibition of the statute, and he will not be compelled by mandamus to issue a certificate, until it appears that the law has been complied with by the company in the adoption of its name.

Having once exercised his discretion, the Secretary of State cannot rescind or revoke his action, in the absence of specific authority to do so. No such authorization appears in the Corporation Code. In the premises, we think the general rule as expressed in "Officers", 46 C. J., par. 292, is applicable. We quote, in part, therefrom:

"In the absence of statutory authority, an officer in performing a statutory duty which does not involve the exercise of discretion is without the power of amendment; and when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, although the statute conferring authority expressly makes his determination discretionary. So the final decisions of public officers are binding upon their successors. * * *"

CONCLUSION

In the premises, we are of the opinion that, having once exercised his discretion in granting a certificate of

Honorable Wilson Bell

-3-

April 27, 1945

change of name of a corporation, the Secretary of State has no authority to revoke or rescind his action with respect thereto.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

SECRETARY OF STATE: Re: The inclusion of lists of employees of the Departments of State Government who have left the service in the last biennium in the Official Manual of Missouri.

July 23, 1945.



Honorable Wilson Bell,
Secretary of State
Capitol Building,
Jefferson City, Missouri.

Dear Mr. Bell:

We are in receipt of your letter of June 16, 1945, which letter reads as follows:

"The 1943-1944 Blue Book contained not only the list of employees of each department who were then working, but it contained also a list of employees who left the service during the last biennium. This requires hundreds of pages in the book, making it bulky and much more expensive.

"Does the law require that this list of employees who left the service during the last biennium be incorporated in the Blue Book this year? We should appreciate your opinion on this question."

Section 15000, R. S. Mo., 1939, is the authority for the publication of the Official Manual of Missouri, which Section reads as follows:

"The secretary of state shall biennially, as soon as practicable after the organization of each general assembly prepare and publish twenty-five thousand copies of the Missouri manual, to contain historical, official, political, statistical and other information in regard to the national and state governments, such as is found in the manuals of 1907 and 1908, said manuals to be by him distributed to the members of the general assembly, the state, judicial

Honorable Wilson Bell

July 23, 1945

and county officers and to the newspapers of the state, the surplus volumes to be distributed throughout the state upon proper applications made therefor."

Nothing in this section requires the inclusion of lists of employees who left the service. The Official Manual of 1907-08 did not include such lists.

Section 15002, Laws of Missouri, 1941, page 690, reads as follows:

"There shall be published in said manual the name, salary and post office address, and previous occupation, including street and number, of every officer and employee, of this state, and it shall be unlawful for any officer of this state to pay or authorize the payment of a salary to any appointee or employee unless he shall first file with the secretary of state, for publication in the manual, the name, salary, post office address and previous occupation of such employee."

From the above statutes we see that the main requirements concerning the matter which should be published in the Blue Book are contained in Sec. 15000, R. S. Mo., 1939. This section requires that historical, official, political and statistical information, such as is found in the Manuals of 1907 and 1908, be included in the Blue Book. An examination of the Manuals of 1907 and 1908 reveals no lists of employees who left the service during the last biennium.

In construing statutes, words must be construed in their natural and ordinary sense. *Berry-Kofron Dental Laboratory vs. Smith*, 345 Mo. 922; *Wallace vs. Woods*, 340 Mo. 452. The plain and ordinary meaning of Sec. 15002, supra, is that the name, salary, post office address and previous occupation of every present officer and employee of this State shall be published in the official manual. The statute requires only that those presently employed at the time of the publishing of the Blue Book be listed.

CONCLUSION

It is therefore, the opinion of this department that the lists of employees who left the service during the last biennium are not required to be incorporated in the Blue Book for this year.

Respectfully submitted,

SMITH N. CROWE,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:LD

STATE SERVICE: Re: Salary of State Service Officer
OFFICER:

August 8, 1945



Mr. Roy Beaman
State Service Officer
State Office Building
Jefferson City, Missouri

Dear Mr. Beaman:

We have your letter of July 19, 1945, requesting an opinion of this department, which letter reads as follows:

"In 1942, I was appointed State Service Officer by Governor Forrest Donnell, the salary at that time being \$2400.00 per year. The State Legislature meeting in Extraordinary Session in 1944, reorganized and enlarged the State Service Officer's Department, adding new duties and functions and setting the salary of the State Service Officer at \$3600.00 per year. To this date my salary has been \$2400.00 per year; therefore I would appreciate your opinion as to the present salary of the State Service Officer.

"This opinion is requested in view of the added duties and responsibilities of the State Service Officer since the Extraordinary Session of the 1944 General Assembly of Missouri. A list of the additional duties are attached herewith, also a recapitulation of the work done in the first six months of 1945.

"This Legislature increased the salary to \$3600.00 per year and appropriated the money for same. The present legislature has made its appropriation on the same basis.

"Taking into consideration the fact that the State Service Officer is under the jurisdiction of the Adjutant General of the State of Missouri, is he not an employee rather

August 8, 1945

than an officer of the State? If this is his status, would this not also have a favorable bearing upon the increase of salary indicated above? A ruling on this point would be appreciated."

Section 15083, R. S. Mo., 1939, reads as follows:

"That upon this article becoming effective the governor of the state of Missouri, by and with the advice and consent of the senate, shall appoint a state service officer, who shall have served in the military forces of the United States of America and who has been honorably discharged therefrom. That said officer shall hold office for a term of four years and shall be subject to removal by the governor for cause and said officer shall be under the adjutant general."

Section 15084, Laws of Missouri, Extraordinary Session, 1944, page 38, reads as follows:

"The State Service Officer and all subordinates and employees of said State Service Officer shall familiarize themselves with all laws, both federal and state, relating to the rights of ex-service men and women, their legal representatives and dependents. The said State Service Officer shall aid and assist veterans of all wars, their dependents or their legal representatives. He shall promote and supervise the dissemination by all available means, information concerning the rights of veterans of all wars, their legal representatives and dependents, in the State of Missouri, under the laws of the United States and the rules and regulations of all the several United States veterans' bureaus, boards, commissions, or other United States departments or authorities which are or may be in any manner concerned with the interest and

welfare of veterans and their dependents; and shall aid and assist all veterans, their legal representatives and dependents, living in the State of Missouri, in preparing, presenting and prosecuting the claims of such veterans for compensation, pensions, insurance benefits, hospitalization, rehabilitation, and in all other matters in which they may have a claim against the United States of America or any State arising out of or connected with their service in the Military Forces of the United States of America, and in prosecuting such claims to their conclusion, when authorized and empowered to do so by such veterans, their legal representatives or dependents. The said State Service Officer, shall in his discretion, have the right to be designated as the attorney in fact by proper written powers of attorney executed by such veterans, their legal representatives or dependents, to accomplish the purposes in this act specified. He shall be authorized to accept, in carrying out the purposes of this Act, and for no other purposes, grants of services, personnel or money, from any Federal agency, or any political subdivision of the state, or from any organization or volunteer agency desiring to participate in the work of said department. It shall be the duty of the State Service Officer and his assistants, to cooperate with the several offices of the United States Employment Service, the United States Veterans' Administration, and all other federal and state offices legally concerned with and interested in the welfare of veterans and their dependents. The State Service Officer shall accept and receive for distribution, and shall distribute, any federal or state funds which are available or may hereafter become available for veterans of the Military Forces of the United States of America, and if a bond be required as a condition to securing such fund or funds, the State Service Officer shall execute such bond or bonds as may be required."

August 8, 1945

Section 15085, R. S. Mo., 1939, reads as follows:

"The said service officer shall have a seal of office and shall be authorized to administer oaths in connection with all applications and matters pertaining to claims of any nature against the United States or any state under any of their laws pertaining to the rights of veterans."

Section 15086, Laws of Missouri, Extraordinary Session, 1944, reads as follows:

"The said State Service Officer shall employ such assistants as may be necessary and within the limits of funds appropriated for such purpose. All of such assistants shall have served in the Military Forces of the United States and shall have been honorably discharged therefrom. The State Service Officer shall employ such attorneys, consultants, clerks, stenographers and employees as may be necessary to properly carry out the provisions of this act, and within the limits of the funds appropriated therefor."

Section 15086-A, Laws of Missouri, Extraordinary Session, 1944, is as follows:

"The salary of the State Service Officer shall not exceed the sum of \$3600.00 per year, and the salaries of the assistants, attorneys, consultants, clerks, stenographers and employees shall be determined and fixed by the State Service Officer, subject to the approval of the Governor."

Section 15086-C, Laws of Missouri, Extraordinary Session, 1944, is as follows:

"The State Service Officer is authorized and empowered to arrange for and accept, through such mutual arrangements as may be made, the

August 8, 1944

volunteer service, equipment, facilities, properties, supplies, funds, and personnel of all veteran, welfare, civic and service organizations, and other organized groups, either similar or dissimilar to the preceding organizations, and individuals, in furtherance of the purposes of this act."

Section 15086-D, Laws of Missouri, Extraordinary Session, 1944, reads as follows:

"The State Service Officer is, by himself, or through his duly appointed assistants, authorized to administer oaths, and acknowledge powers of attorney in favor of the State Service Officer, and such other instruments as shall be used in connection with applications and matter pertaining to claims of any nature against the United States of America or any State under any law or laws pertaining to the rights of veterans, their legal representatives and dependents, living within the State of Missouri."

As we read your letter, the questions are,

(1). Would an increase in the salary of the State Service Officer violate any provision of the Constitution of 1945?

(2). Who has the authority to fix the salary of the State Service Officer?

(3). Does the fact that an officer acquires additional duties entitle him to additional compensation?

Section 15 of Article VII of the Constitution of 1945 provides as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

August 8, 1945

From an examination of the above constitutional provision it is clear that the salary of the State Service Officer could not be constitutionally increased if the officer is a public officer of the State.

The question of whether a person is a public officer or an employee has been discussed in recent Missouri Supreme Court cases. In *State vs. Bode*, (1938) 113 S. W.(2d) 805, the Court had before it the question of whether the Director of Conservation was a public officer or an employee. The court said, l.c. 806:

"It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject-matter of the enactment of the statute or the adoption of the constitutional provision. In other words, the duties to be performed, the method of performance, end to be attained, depository of the power granted, and the surrounding circumstances must be considered. In determining the question it is not necessary that all criteria be present in all cases. For instance, tenure, oath, bond, official designation, compensation, and dignity of position may be considered. However, they are not conclusive. It should be noted that the courts and text-writers agree that a delegation of some part of the sovereign power is an important matter to be considered. The question is considered at length in 46 C.J. p. 924. In determining that a deputy sheriff was a public officer, we stated the rule as follows:

'A public office is defined to be "the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." Mechem, Pub. Off. 1. The individual who is invested with the auth-

August 8, 1945

ority, and is required to perform the duties, is a public officer.

"The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer.'" (Cases cited)

Sections 15084, 15086-C and 15086-D, supra, quoted above, designate a portion of the State sovereignty to the State Service Officer. Under these sections, he has the right to aid Veterans in obtaining their rights of all kinds under the laws of the United States and the State of Missouri, and the rules and regulations of the Veteran's Bureau. He has the right to accept grants of service, personnel, or money from any Federal Agency or political subdivision of the State. He has the right to distribute Federal and State funds available for Veterans. He has the right to administer oaths and acknowledge powers of attorney and other instruments. He has the right to arrange for and accept services, equipment, properties, etc., of civic and service organizations. The State Service Officer thus exercises the sovereign power of the State, and the Bode case, supra, considered the exercise of this function the most important element in determining whether the person is a public officer or not.

In Kirby vs. Nolte, (1942) 164 S. W.(2d) 1, the Court had before it the question of whether the Director of Personnel of the Civil Service Commission was a public officer. The Court in that case said:(l.c. 8)

"The writer was the author of the minority opinion in the Bode case, and would venture to urge the same views again here--if the facts in this case were no stronger than those in the Bode case. But they are. As said in the majority opinion in that case, 'it is not possible to define the words "public office or public officer."' But the opinion went on to say 'courts and text-writers agree that a delegation of some part of the sovereign power is an important matter to be considered.' That rather vague definition was the basis of the majority opinion. But the definition is clear and satisfying if to it the

further requirements be added, that such power must be substantial and independently exercised with some continuity and without control of a superior power other than the law."

Judge Ellison, writing the opinion in this case, was the author of a minority opinion in the Bode case. In the Nolte case, Judge Ellison stated that when there is exercised a part of the sovereignty of the State by an officer and, coupled with this, such power is independently exercised without the control of a superior power other than the law, the officer is a public officer and not an employee. The statutes relating to the State Service Officer give him the authority of exercising the sovereign power without any supervision except the remote and indirect supervision arising from the fact that the Governor of the State has the right to remove him from office for cause. Therefore, according to the latest cases on the subject, the State Service Officer is a public officer. These cases also set out other criteria for determining whether a person is an officer or an employee. These are a fixed tenure of office, an oath, a bond, an official designation and compensation. It is not necessary that all of these be present in all cases. (State vs. Bode, supra.) The State Service Officer, however, is within the purview of some of these criteria. For instance, in Section 15083, supra, he has a fixed term of office, an official designation, and his compensation is fixed on a yearly basis and is a substantial compensation.

We think, therefore, the position of State Service Officer is such as to render him a public officer. Section 13 of the new Constitution, therefore, prohibits any increase in the State Service Officer's salary during his term of office.

The second question presented is that of where the authority to fix the salary of the State Service Officer lies, (within the \$3600.00 per year limit fixed by the Legislature). We have found but one case which is of any aid in determining this question where the Legislature has failed to designate where such authority lies. In the case of Flurry vs. Jackson County, 100 So. 279, a statute of the State of Mississippi reads as follows:

"The board of supervisors are hereby authorized in their discretion, if they consider it necessary and to the general interest of the county or district, to employ a competent person to serve as

August 8, 1945

road commissioner, whose compensation shall not exceed \$5.00 per day for each day served in the actual discharge of his duties as defined by the board of supervisors of each county.* * *"

The court held that the board of supervisors of the county did not fix the salary of the road commissioner at the correct rate because they set it at \$125.00 per month, regardless of the number of days he actually discharged his duties. However, the court did not question the right of the board to fix the salary of the commissioner. Thus, we think, the case is authority for the proposition that the appointing or hiring power has also the right to fix salaries of its appointees where the Legislature does not speak on the subject. The Governor of Missouri has the authority, under Section 15084, R. S. Mo., 1939, of appointing the State Service Officer..

Section 15086-A, above quoted, gives the Governor the approval of salaries of all employees after they have been fixed by the State Service Officer. We think this section, plus the fact that the Governor has the power of appointing the State Service Officer, indicates the intent of the Legislature that the Governor should have a supervisory position over the salaries of all personnel of the State Service Office.

The fact that the State Service Officer has additional duties does not entitle him to additional compensation unless the statute authorizes it. Coleman vs. Kansas City, 173 S. W.(2d) 572, 351 Mo. 254.

We think the statement in Section 15084, R. S. Mo., 1939, that the State Service Officer is "under the Adjutant General," does not give the Adjutant General any supervisory power over the salary of the State Service Officer. The legislative enactment relating to the office of the State Service Officer delegates no such right to the Adjutant General either as to the State Service Officer or as to his employees. The statute does, however, give supervisory power over subordinate salaries to the Governor of Missouri.

CONCLUSION

It is, therefore, the opinion of this department that the salary of the State Service Officer cannot be constitutionally

Mr. Roy Beaman

-10-

August 8, 1945

increased during his term of office. From the above, it is the further opinion of this department that the Governor of the State of Missouri has the authority to fix the salary of the State Service Officer within the maximum of \$3600.00 per year prescribed by the Legislature.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

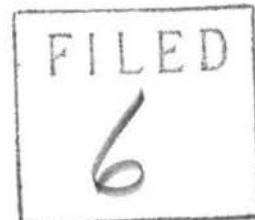
J. E. TAYLOR
Attorney General

SNC:mw

STATE SERVICE OFFICER: A Circuit Clerk may also serve as
an Assistant State Service Officer.
OFFICERS:

Circuit Clerk:

November 15, 1945



12/18

Honorable Roy F. Beaman
State Service Officer
Jefferson City, Missouri

Dear Sir:

Your letter of November 6, 1945, requesting an opinion from this department, reads as follows:

"The State Service Officer's Law provides among other things, that we may cooperate with all other agencies in carrying out the provisions of the State Service Officer's Law. This we have practiced to the fullest extent.

"I respectfully request your opinion as to the legality of a Circuit Clerk becoming an Assistant State Service Officer.

"The reason for asking this opinion is that the Veterans' organizations of a certain County in the State have selected their Circuit Clerk as their Service Officer. They are furnishing him a paid stenographer and we would like very much to have this group affiliated with this office."

In a careful research we fail to find any statute or any section under the Constitution of 1945, which prohibits a person from holding a county office and a state office, or serving as a circuit clerk and assistant state service officer. The Constitution does prohibit a state officer from holding an office under the United States, members of the organized militia or the reserve corps excepted, as appears in Article VII, Section 9 of the Constitution of Missouri 1945.

Since there is no constitutional prohibition under the Constitution or the statutes preventing a person from holding, at the same time, a state office and a county office, we must refer to the common law. In the case of *State ex rel. Walker, Attorney General, v. Bus*, 135 Mo. 325, which was passed upon by the Supreme Court of this state June 30, 1896, and which has not been overruled in any manner, it was held that under the common law the question as to whether or not a person could hold two county offices should depend upon whether or not the two offices were incompatible. This case held that a deputy sheriff of the City of St. Louis could also hold the position of school director in the City of St. Louis.

The general rule of common law appears in 100 A.L.R. 1164, as follows:

"It is a well settled rule of the common law that a person cannot at one and the same time rightfully hold two offices which are incompatible, and, thus, when he accepts appointment to the second office, which is incompatible, and qualifies, he vacates, or by implication resigns, the first office."

The case of *State ex rel. Walker, Attorney General, v. Bus*, supra, was followed in the case of *State ex rel. Langford v. Kansas City*, 261 S.W. 115. In that case the court held that the office of deputy sheriff was not incompatible with the office of city clerk. In paragraph 1 the court said:

"The only point raised by appellants in this case, which was not decided adversely to appellants' contention in the Prior Case, is the contention that relator's appointment and acceptance of the office of deputy sheriff on January 1, 1921, and his discharge of the duties of that office up to the time of trial, was incompatible with the office of clerk of the board of public works. The evidence showed that the duties of relator as such clerk were clerical, and the law fixes his duties as deputy sheriff as being to attend to all the duties of a sheriff. In support

of appellants' contention that such positions were incompatible, the following cases are cited: State ex rel. v. Walbridge, 153 Mo. 194, 54 S.W. 447; State ex rel. v. Draper, 45 Mo. 355; State ex rel. v. Lusk, 48 Mo. 242. And respondents cite as holding that such offices are not incompatible with each other, State ex rel. v. Bus, 135 Mo. 325, 36 S.W. 636, 33 L.R.A. 616 (court en banc) and Gracey v. St. Louis, 213 Mo. 395, 111 S.W. 1159."

In the Langford case the court, at page 116, said:

"In State ex rel. v. Bus, 135 Mo. 325, 36 S.W. 636, 33 L.R.A. 616, before the court, en banc, the question was most elaborately considered. MacFarlane, J., rendered the opinion, and it was held that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers. The court said, at page 338 of 135 Mo.:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two -- some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Also, in the case of State ex rel. v. Lusk, 48 Mo. 242, the Supreme Court of this state held that the office of the clerk of the circuit court was not incompatible with that of the clerk of the county court. This case was a case originating in the Circuit Court of Cole County, Missouri.

Since the matter set out in your request must be considered according to the common law, it results that the ruling must be made in accordance with the facts in each separate case. The general duties of the circuit clerk are set out in Sections 13293-13300, R. S. Mo. 1939, and provide that the clerk shall keep the records, papers, seal and property belonging to his office, and that he shall record the judgments, rules, orders and other proceedings of the circuit court, and make alphabetical indexes thereto; issue and attest all processes when required by law, affixing the seal of his office thereto, and account for all moneys coming into his hands on account of costs or otherwise, and to punctually pay over the same.

Under the provisions of the article dealing with the state service officer, we find the following sections providing the employment of assistants and the duties of the state service officer.

Section 15084 Mo. R.S.A. (reenacted Laws 1944, Extra Session, p. 38), provides as follows:

"The State Service Officer and all subordinates and employees of said State Service Officer shall familiarize themselves with all laws, both federal and state, relating to the rights of ex-service men and women, their legal representatives and dependents. The said State Service Officer shall aid and assist veterans of all wars, their dependents or their legal representatives. He shall promote and supervise the dissemination by all available means, information concerning the rights of veterans of all wars, their legal representatives and dependents, in the State of Missouri, under the laws of the United States and the rules and regulations of all the several United States veterans' bureaus, boards, commissions, or other United States departments or authorities

which are or may be in any manner concerned with the interest and welfare of veterans and their dependents; and shall aid and assist all veterans, their legal representatives and dependents, living in the State of Missouri, in preparing, presenting and prosecuting the claims of such veterans for compensation, pensions, insurance benefits, hospitalization, rehabilitation, and in all other matters in which they may have a claim against the United States of America or any State arising out of or connected with their service in the Military Forces of the United States of America, and in prosecuting such claims to their conclusion, when authorized and empowered to do so by such veterans, their legal representatives or dependents. The said State Service Officer shall, in his discretion, have the right to be designated as the attorney in fact by proper written powers of attorney executed by such veterans, their legal representatives or dependents, to accomplish the purposes in this act specified. He shall be authorized to accept, in carrying out the purposes of this Act, and for no other purpose, grants of services, personnel or money, from any Federal agency, or any political subdivision of the state, or from any organization or volunteer agency desiring to participate in the work of said department. It shall be the duty of the State Service Officer and his assistants, to cooperate with the several offices of the United States Employment Service, the United States Veterans' Administration, and all other federal and state offices legally concerned with and interested in the welfare of veterans and their dependents. The State Service Officer shall accept and receive for distribution, and shall distribute, any federal or state funds which are available or may hereafter become available for veterans of

the Military Forces of the United States of America, and if a bond be required as a condition to securing such fund or funds, the State Service Officer shall execute such bond or bonds as may be so required."

Section 15086 Mo. R.S.A. (Laws of 1944, Extra Session, p. 39), provides as follows:

"The said State Service Officer shall employ such assistants as may be necessary, and within the limits of funds appropriated for such purpose. All of such assistants shall have served in the Military Forces of the United States and shall have been honorably discharged therefrom. The State Service Officer shall employ such attorneys, consultants, clerks, stenographers and employees as may be necessary to properly carry out the provisions of this act, and within the limits of the funds appropriated therefor."

We can see nothing that is inconsistent and incompatible with the duties of a circuit clerk and the duties of an assistant state service officer as set out in the above sections. The two offices are entirely disconnected and there appears to be nothing inconsistent in the functions of the two.

In regard to the acceptance by the state service officer of the voluntary service of the personnel of all veteran, welfare, civic and service organizations, the Legislature has enacted Section 15086-C Mo. R.S.A. (Laws of 1944, Extra Session, p. 39), which provides as follows:

"The State Service Officer is authorized and empowered to arrange for and accept, through such mutual arrangements as may be made, the volunteer service, equipment, facilities, properties, supplies, funds, and personnel of all veteran, welfare, civic and service organizations, and other organized groups, either similar or dissimilar to the preceding organizations, and individuals, in furtherance of the purposes of this act."

Hon. Roy Beaman

(7)

The above section shows that the Legislature has intended that the state service officer be afforded the use of all services that may be volunteered in furtherance of the purposes of the State Service Officer Act, in assisting the veterans of all wars, their legal representatives and dependents, in the state of Missouri.

CONCLUSION

Therefore, it is the opinion of this department that a circuit clerk who has served in the military forces of the United States and been honorably discharged therefrom, may also serve as an assistant state service officer.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

APPROVED:

(Acting) Attorney General
W. O. JACKSON

AVO:GP

6
Smith
SHERIFF'S OFFICE: VACANCY:
SPECIAL ELECTION: TENURE:

When a vacancy occurs in the office of Sheriff, 9 months prior to a general election, the person elected at a special election called by the Co. Court, may hold the office under his commission for the complete period of the unexpired term and until his successor is elected and qualified, at the general election for that office in 1948.

November 26, 1945

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Honorable Wilson Bell
Secretary of State
State of Missouri
Jefferson City, Missouri

Dear Secretary Bell:

Your letter requesting an opinion of what period the tenure of office will be of the Sheriff elected at a special election recently held in Barton County, Missouri, has been received.

Your letter states:

"At the request of the Governor's Office, I am referring to you herewith the attached letter from the County Clerk of Barton County, relative to the commission issued by Governor Phil M. Donnelly to J. D. Bassett, the newly elected Sheriff of Barton County, wherein it states: 'to fill the unexpired term and until his successor is elected and qualified.'

"I will appreciate an early opinion from you in this matter."

Your request for this opinion is based upon the contents of a letter submitted to you, dated November 8, 1945 by Honorable Hollis Stockdale, County Clerk of Barton County, Missouri.

It appears from Mr. Stockdale's letter that the Sheriff of Barton County, elected at the November general election in 1944, resigned his office on October 6th, last, and that the present Sheriff was elected on October 30, at a special election.

The statutes of this State, Section 13143, R.S. Mo. 1939, prescribe the procedure to fill a vacancy in the office of Sheriff when such vacancy may occur from any cause. That part of said Section 13143, providing for a special election, is as follows:

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified. * * *".

Section 11509, R.S. Mo. 1939, excepts the office of Sheriff from the offices the Governor may fill by appointment when a vacancy occurs. That exception leaves Section 13143, supra, as constituting the sole method provided in our statutes for filling a vacancy in the office of Sheriff.

Section 13143 was first enacted by the Legislature in 1887, Laws 1887, page 281. The evident intention and purpose of the Legislature was to put into operation a method for filling a vacancy in the office of Sheriff because of the terms of Section 5527, R.S. Mo. 1879, now Section 11509, R.S. Mo. 1939, excepting that office from public offices to be filled in case of a vacancy, by the Governor. There was sound reason for this, we believe. Section 11509, R.S. Mo. 1939, permits, and the same section in previous revisions permitted, the Governor to appoint where a vacancy in those offices not so excepted happens until the next general election. The Legislature, mindful of the right of the people to make their own choice of a Sheriff in case of a vacancy in the office because his official duties vitally affect so many of the rights of the people, removed this office from the appointive power of the Governor, and placed it temporarily, in the

hands of the County Court with the mandatory duty attached to call a special election immediately if the vacancy happened more than nine months prior to a general election. This Section undoubtedly means that the person elected Sheriff at such special election shall hold the office for the full remaining period of the term until the next general election for Sheriff, in this case until 1948.

The people having the right, and having thus exercised the right to elect a Sheriff to fill the vacancy for the remainder of the unexpired term in this case, the matter would seem to be at an end. Surely no one would be able to read into the statute, Section 13143, words requiring two elections to fill one vacancy in the office of Sheriff.

This statute cannot, and should not, be construed to require the vain and useless procedure of the expense and effort of two elections.

In case of appointments in elective offices by the Governor to fill vacancies under said Section 11509, the rule is different. It has been held by our Supreme Court in such cases that the remaining period of the term after a vacancy happens must be filled at the next ensuing general election after the appointment. There are two decisions by our Supreme Court so holding. One of these cases is the case of State ex inf. vs. Barrett, Attorney General, ex rel. Shumard vs. McClure, 299 Mo. 688, which was a case where a vacancy occurred in the office of County Treasurer. The Supreme Court held that an election was properly held at the next ensuing general election to fill the remainder of the unexpired term succeeding an appointment made immediately upon the vacancy occurring. In so holding, the Court said:

"Originally special elections were provided for to fill vacancies so as to cut short the tenure of appointees. Apparently the expense and trouble of having special elections to fill vacancies caused the Legislature in 1879 to provide for vacancies to be filled by appointment until the next succeeding general election. This shows that the legislative policy of the State has

been to fill a vacancy for an elective office by election as soon as practicable after the vacancy occurs."

The other one is the case of State ex rel. Bothwell, Relator, vs. Green, Clerk of the County Court of Pettis County, Missouri, 352 Mo. 801. That was a case where a vacancy had occurred in the office of County Collector of Pettis County, Missouri. In holding that the office was open for election at the next general election after the vacancy took place, the Supreme Court, l.c. 807, 808, said:

"The legislative policy for filling vacancies has been described by the learned Judge White in State ex inf. Barrett v. McClure, 299 Mo. 688, 253 S.W. 743. That case construed Section 11509 and held it plainly provided an election may be had for an unexpired term and the governor would have no authority to make an appointment which would conflict with such provision. Judge White then stated: 'Originally special elections were provided for to fill vacancies, so as to cut short the tenure of appointees. Apparently the expense and trouble of having special elections to fill vacancies caused by the legislature in 1879 to provide for vacancies to be filled by appointment until the next succeeding general election. This shows that the legislative policy of the state has been to fill a vacancy for an elective office by election as soon as practicable after the vacancy occurs.'

"In as much as the unexpired term of the office of collector for Pettis County must be filled at the coming general election relator is entitled to the relief he seeks. Our peremptory writ should issue ordering the

November 26, 1945

acceptance and filing of his declaration of candidacy for that office and placing his name on the ballot."

The electorate of Barton County having filled the vacancy by a special election, which happened upon the resignation, October 6, of the then Sheriff, according to the terms of said Section 13143, as an exception to the elective offices to be filled, upon a vacancy, by the Governor according to Section 11509, there cannot be another election in said office until 1948, at the regular general election for the election of a Sheriff. The present Sheriff, we believe, was therefore elected for the full period of the remaining unexpired term of the Sheriff who resigned on October 6, 1945. We think this is so, else no special election would have been provided for under the terms of Section 13143. If said Section 13143 had not provided for an exclusive method for filling the full unexpired term of the Sheriff upon a vacancy happening, the Sheriff's office would not have been excepted from the terms of Section 11509, we believe. The Governor would then have had the appointive power to fill the vacancy and his appointee would hold office until the next ensuing general election. We believe Section 13143 stands out as an exclusive plan of procedure in filling a vacancy in the office of Sheriff to the end that when a special election is had and a Sheriff is elected he will hold office for the full period of the unexpired term.

CONCLUSION.

It is, therefore, the opinion of this Department that:

- 1) Under the terms of Section 13143, R.S. Mo. 1939, when a vacancy happened on October 6, 1945, by the resignation of Mr. C. E. Austin, the then Sheriff of Barton County, and Mr. J. D. Bassett was elected at a special election called by the County Court of Barton County, Mr. Bassett was elected for the full period of the unexpired term for which Mr. Austin was elected in 1944, and that Mr. Bassett will hold the office until the first day of January after the general election in November, 1948, at which time a Sheriff will be elected in Barton County.

Honorable Wilson Bell

-6-

November 26, 1945

2) That the words written into the commission of the newly elected Sheriff of Barton County wherein it states: "to fill the unexpired term and until his successor is elected and qualified", are pertinent and proper in designating the period Mr. J. D. Bassett shall hold the office, and, under the terms of said Section 13143, have the effect of giving him a tenure in office until the first day in January after the next ensuing general election to be held in Barton County in 1948, the regular general election to elect a Sheriff in Barton County, Missouri.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

RAILROADS--INCORPORATION TAX-- : A foreign railroad corporation
CERTIFICATE " CARRY ON BUSINESS: newly organized in another State
IN MISSOURI. : to purchase, and which does pur-
: chase, the assets and property
: at a foreclosure sale of a former
: liquidated railroad must pay in-
: corporation tax under Sec. 113,
: page 470, Laws of Missouri 1943.
: Secretary of State not authorized
: to issue certificate to such cor-
December 19, 1945 :poration to carry on a railroad
:business in this State until such
:tax is paid.

Honorable Wilson Bell
Secretary of State
Jefferson City, Missouri

Attention: Honorable Russell Maloney
Supervisor, Corporation
Registration.



Dear Secretary Bell:

The letter written by Mr. Russell Maloney, Supervisor, Corporation Registration, to this Department, calling attention to a letter from your Department, directed to Honorable Roy McKittrick, Attorney General of Missouri, requesting an opinion whether the Wabash Railroad Company, under the facts stated in the letter to General McKittrick, is required to pay incorporation organization tax before it may lawfully operate its lines of railroad in this State, has been received. Your letter quoting the letter to General McKittrick, is as follows:

"Will you please refer to our letter of July 29, 1943, which reads as follows:

"Hon. Roy McKittrick
Attorney General
Supreme Court Building
Jefferson City, Missouri

"Dear Sir:

"On April 14, 1916, the Wabash Railway Company, a railroad corporation organized under the laws of the State of Indiana, was licensed to do business in Missouri as a foreign corporation pursuant to the requirements of Section 3039 of the Revised Statutes of Missouri of 1909. At that time the Wabash Railway Company paid to the State Treasurer of the State of

Missouri, the sum of \$19,671.50, that being the amount required by said Section 3939, Revised Statutes of Missouri, 1909, to be paid in to the State Treasury of Missouri upon the proportion of the capital stock of said company represented by its property and business in Missouri as incorporating tax and fees and as a fee for the issuing a license authorizing said company to do business in the State of Missouri.

"Section 3039, Revised Statutes of Missouri, 1909 is now Section 5074, Revised Statutes of Missouri, 1939. The license so issued to the Wabash Railway Company in 1916 was forfeited on January 1, 1943, for the reason that said Indiana corporation did not file its annual registration, annual statement and anti-trust affidavit for 1942 as required by Sections 5085, 5086 and 5087, Revised Statutes of Missouri, 1939. The action of the Secretary of State in forfeiting said license was in accordance with Section 5091, Revised Statutes of Missouri, 1939.

"Subsequent to the original licensing it operated a line of railway into and through the State of Missouri. The lines of railway so operated by said Indiana corporation were acquired by it through a foreclosure sale of the railroad properties of the Wabash Railroad Company pursuant to a decree of foreclosure and sale entered on or about January 30, 1914, by the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

"The said Wabash Railway Company, an Indiana corporation, which was licensed to do business in Missouri in 1916, was reorganized in an equity receivership in the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, and, pursuant to a decree of foreclosure and sale and orders of said court, and orders of the Interstate Commerce Commission,

December 19, 1945

the properties of the said Wabash Railway Company, were conveyed to Wabash Railroad Company, a new Ohio corporation, incorporated in said state of Ohio on September 2, 1937. The new Ohio corporation has been operating said properties, including said lines of railway in this state, since January 1, 1942. The deed to said properties as approved by the United States District Court in said reorganization proceeding is dated December 31, 1941 and was delivered to said new Ohio corporation on June 18, 1942. (Attached hereto are copies of the decrees and orders of the court approving a plan of reorganization and authorizing the conveyance of said properties.)

"It is the contention of this department that the new corporate entity, Wabash Railroad Company, organized under the laws of the State of Ohio on September 2, 1937, should be licensed as provided for by Section 5074, Revised Statutes of Missouri 1939, and should pay into the State Treasury of Missouri the incorporating tax required by said Section together with the fee for the issuance of a certificate authorizing it to do business in this state. It is the further contention of this department that it cannot accept the filing of the annual registration, statement and anti-trust affidavit required by Sections 5085, 5086 and 5087, Revised Statutes of Missouri 1939, or furnish the blanks for such purpose as provided by Section 5096, Revised Statutes of Missouri 1939, unless and until said new Ohio corporation is licensed to do business in this state.

"The contentions of the Wabash Railroad Company with respect to the questions involved are set out in the attached memorandum prepared by Mr. Carleton S. Hadley, General Counsel for the Wabash Railroad Company.

"It is the position of this department that

December 19, 1945

the proviso in Section 5074, Revised Statutes of Missouri, 1939 exempting from the payment of incorporating taxes and fees, railroad companies which have heretofore built their lines of railway into or through this state, was intended by the General Assembly of Missouri, to apply only to those railroad companies owning and operating lines of railway in this state at the time of the original enactment of said law in 1891. See Laws of Missouri 1891, page 75.

"It is respectfully requested that we may have the benefit of your opinion concerning the questions stated.

Yours very truly
Russell Malone, Supervisor
Corporation Registration

by: W. R. Murrell, Deputy Supervisor
Corporation Registration."

"Upon checking our records, it appears we have never received a reply to the above quoted request and we will appreciate it if you will give the matter your attention."

Your letter has been very helpful in giving the facts of the case whereby it appears that the property of the original Wabash Railroad Company was sold under a foreclosure decree of the United States District Court for the Eastern Division of the Eastern District of Missouri, on or about January 30, 1914, and that all of the property, real and personal, of the original company was purchased by the Wabash Railway Company, a corporation organized at about that time under the laws of the State of Indiana. It is said the then new Wabash Railway Company was licensed to do business in Missouri in 1916. It is said that at the time the Wabash Railway Company was permitted to enter into this State to operate its railway business, the company paid the corporation organization tax required by Section 3939, R.S. Mo. 1909, which said Section was the same as Section 5074, R.S. Mo. 1939, and both of which said Sections were the same as our present Section 113, Laws of Missouri, 1943, page 470, in our new

Corporation Code of this State. Section 5074, R.S. Mo. 1939, was repealed by the Laws of Missouri, 1943, page 410, and said Section 113 was enacted in place thereof. The said Ohio Corporation, has failed and refused to pay the incorporation organization tax required by said Section 113, Laws of Missouri, 1943, on the ground that it "stepped into the shoes" of the Wabash Railway Company, and that the Secretary of State of Missouri has no right or authority to demand the payment of such organization corporation tax.

Your letter states that it is the position of your Department that the proviso in our said former Section 5074, R.S. Mo. 1939, and carried into the amendment of 1943, as said Section 113, Laws of Missouri, 1943, page 470, exempting from payment of incorporation taxes and fees, railroad companies which have heretofore built their lines of railway into or through this State, was intended by the General Assembly of Missouri to apply only to those railroad companies owning and operating lines of railway or railroad at the time of the original enactment of said law in 1891.

We think you are correct in the position you take in this matter. We believe that the new Ohio corporation is required by the statutes of this State to pay such incorporation organization tax and the other fees mentioned in your letter, and that it must otherwise comply with the requirements which you set forth in your letter, before you would be empowered to issue a certificate authorizing the new Wabash Railroad Corporation to do business in this State, and that you cannot lawfully accept the filing of the annual registration, statement and anti-trust affidavit from said company as is required by the statutes of this State, or furnish said company such blanks for such purpose unless and until said Wabash Railroad Company is licensed to do business in this State.

That part of our said Section 113, Laws of Missouri, 1943, page 470, requiring corporations when organized to pay the organization incorporation tax therein provided, is as follows:

"No corporation shall be organized under this act unless the persons named as incorporators shall at or before the filing of the articles of incorporation pay into the State Treasury \$50.00 for the first \$30,000.00 or less of the authorized shares

of such corporation and a further sum of \$5.00 for each additional \$10,000.00 of its authorized shares, and no increase in the authorized shares of such corporation shall be valid or effectual until such corporation shall have paid into the State Treasury \$5.00 for each \$10,000.00 or less of such increase in the authorized shares of such corporation, and it shall be the duty of said corporation to file a duplicate receipt of the State Treasurer for the payments herein required to be made with the Secretary of State as is provided by this Act for the filing of articles of incorporation; provided, that the requirements of this section to pay incorporation taxes and fees shall not apply to foreign railroad corporations which have heretofore built their lines of railway into or through this state. * * * "

Prior to 1891, railroad corporations organized in States other than Missouri, were permitted to come into this State, construct their lines of railway, and operate their business without the payment of any corporation tax, such as was required of domestic corporations. The Legislature of this State took notice of the inequality of such laws giving foreign corporations such preference over domestic corporations, and thereupon enacted the section that is presently our said Section 113, Laws of Missouri, 1943, page 470.

The original Act, Laws of Missouri, 1891, Section 2, page 75 was passed with an emergency clause, and consequently took effect on the date of its approval, April 21, 1891. The words of the proviso of said Section 113, supra, are precisely the same as were contained in the proviso of the said original Act of 1891, and the same as were carried along in each revision of our statutes down to, and including, the revision of 1939, except, in the amendment of 1943, where it will be observed that the word "foreign" appears in said Section 113 immediately preceding the words railroad corporations which did not before appear. Said proviso in said Section 113, is as follows:

"provided, that the requirements of this section to pay incorporation taxes and fees

shall not apply to foreign railroad corporations which have heretofore built their lines of railway into or through this state."

The Supreme Court of Missouri had before it, for construction, the original Act of April 21, 1891, imposing the tax in question upon railroad companies in the case of State vs. Cook, Secretary of State, 171 Mo. 348. The case involved the exact question before us here. That case was one where a railroad company, organized under the State of Kansas, had, prior to enactment of the said Act of 1891, built its line of railway from the State of Kansas into the State of Missouri. Some time after the passage of the Act of 1891, the said Kansas corporation constructed other and further lines of its railroad in this State. The company applied for its certificate of authority to operate a railroad in the State of Missouri. The company maintained that because it has built a part of its lines of railway before the passage of the Act of 1891, it was immune and exempted by the terms of the proviso of the Act of 1891 from paying any organization tax, and that the construction of that part so built before 1891, took care of the whole situation, including that part of its lines of railways built after the passage of the Act of 1891. The Secretary of State refused to grant the certificate, on the ground that the company had not built all of its lines of railway prior to the passage of the Act of 1891, and, therefore, must pay the organization incorporation tax on its increased capitalization, by reason of the newly constructed lines of railway.

The railroad filed a mandamus suit to compel the Secretary of State to grant the certificate of authority for the company to carry on business in this State without the payment of said tax. The issuing of the alternative writ of mandamus was waived, and a demurrer was filed by the Secretary of State. Of the demurrer, the Court in its opinion, l.c. 355, said:

"The main ground on which the demurrer is rested, is, that on the facts stated in the petition, the relator is not entitled to the certificate or license demanded, because it has not paid into the State treasury the amount of the tax or fee that a railroad company asking to be incorporated under the laws of this State, with the same or similar rights, would be required to pay."

The Court considered and discussed fully the statutes of the State relating to the case. In holding that such previous part of construction did not constitute a compliance with the Act of 1891, with respect to the construction afterward of its complete lines of railway, and that the railroad was liable for the tax, the Court, l.c. 359, further said:

"* ** The company can not, for the purpose of relieving itself of the tax imposed by the statute, say this fifty miles constitutes its road, and then for the purpose of obtaining the license authorized by the statute, say it constitutes only a small part of its road. If one of the foreign railroad companies owning railroads built prior to 1891, reaching from St. Louis to Kansas City, should now seek to build a new line over a route not before occupied by it, it could do so only on the same terms that a domestic corporation could. And so a company found with an unfinished road when the Act of 1891 went into effect, if it was entitled to any exemption from the incorporating tax therein required, it was so only to the extent to which it had then built its road into the State, and as to its future building it must stand on a plane with domestic corporations and with other foreign corporations who might now seek to build over new routes."

The Court concluded its opinion in the case by denying the writ of mandamus to the railroad, and dismissed the case.

The opinion of the Supreme Court in the Cook case, supra, fully sustains the position taken by your Department, that the proviso in former Section 5074, now Section 113, Laws of Missouri, 1943, page 470, exempting from the payment of incorporating taxes and fees, railroad companies, which have heretofore built their line of railway into or through this State, was intended by the Legislature to apply, and does apply, only to those railroad companies owning and operating lines of railway in this State at the time of the original enactment of said Law in 1891. Such exemption, it will be seen, could not include the present Wabash Railroad Company, the Ohio corporation herein named, because said Company was

not in existence on April 21, 1891, having been incorporated in the State of Ohio in 1937, nor has it built any line of railroad in this State since its organization.

The Federal Court could not, and its decree as we read it, does not undertake to convey from the Wabash Railway Company, the Indiana corporation, to the Wabash Railroad Company, the Ohio corporation, any right to transact business in Missouri, exempting it from paying the organization corporation tax imposed by our said Section 113.

The text writers and Courts of other jurisdictions have considered the principles here involved. It is the uniform holding in both text and decision, that where a reorganization or a reincorporation eventuates into the forming of a new corporation it must pay such organization tax as the statute of any State demands. 14 A C.J., page 1039, states this text on the subject:

"Organization tax. Where the reincorporation does not create a new corporation the reincorporated company is not liable for an organization tax imposed on new corporations. Where the reincorporation constitutes a new corporation the tax applies."

The identical state of facts, and the identical principles involved here were before the Supreme Court of the State of New York in the case of In Re N.Y. & Surburban Inv. Co., 16 N.Y.S. 213. The Court held that under a reorganization plan the reorganization constituted a new corporation, and as such it was subject to the franchise tax imposed by the Laws of the State of New York. The Court in the case so holding, l.c. 215, 216, said:

"* * * It can make no difference that the individuals forming the new corporation are already organized as a body corporate under another act. It is as individuals, and not as a corporation, that they act in making and filing the new certificate, thereby forming themselves into a new corporation. By their reorganization under the new law they become a new corporation, formed by a new process having all the rights and powers of the old corporation, but having also new rights and powers, the result of the new incorporation. Upon filing the new certificate, the old corporation is at an end. A new one

has taken its place. 'From the time of such filing such corporation shall be deemed to be a corporation organized under the act of 1890,' and, although the existing liabilities of the old corporation are not in any way affected by the reorganization, it has no longer any corporate existence. * * * ".

Another case so holding, decided by the Court of Appeals of New York is *People ex rel. Schurz vs. Cook*, reported in 18 N. E. 113, and also reported in 110 N.Y. 443. The Court held that the statutes requiring an organization tax applied to all new corporations. The Court on the point, l.c. 114, said:

"We think none of the claims is well founded. The act by its terms applies to every corporation, and the tax is payable upon its incorporation, and hence it cannot be restricted in its meaning to those cases only in which the state directly grants some franchise to a corporation other than the franchise to be a corporation. There is nothing in the context which should so restrict the provisions of the act, and there is no view of the question in which such a narrow construction could be even plausibly maintained as against the plain language of the law.

"We think it is also plain that, under the reorganization acts above mentioned, when the purchasers at the foreclosure sale undertake to reorganize under those acts, and for that purpose to file in the secretary's office a certificate, upon the filing of which they become a body politic and corporate, the corporation thus formed is a new and an entirely different one from that whose property and franchises the purchasers may have bought under the foreclosure proceedings. It is true that the corporation about to be formed by the filing of the certificate

has by force of the statute when formed all the rights, franchises, powers, privileges, and immunities which were possessed before such sale by the corporation whose property was sold; but that does not make the corporation the same by any means. The right to be a corporation, which the old corporation had, was not mortgaged and was not sold, and did not pass to the purchasers; and they only obtain such a right upon filing the certificate mentioned; and then they obtain it by direct grant from the state, and not in any degree by the sale and purchase of the franchises, etc., of the old corporation."

The above cited case of *People ex rel. Schurz vs. Cook*, was taken by writ of error to the Supreme Court of the United States where the decision of the New York Court was affirmed. It is reported in 148 U.S. 397.

The Supreme Court of the United States had before it the same question in the case of *Morgan vs. Louisiana*, 93 U.S. 217. In holding that upon the sale of property and franchises of a railroad corporation under foreclosure decree, such immunity is a personal privilege of the company, and is not transferable, the Court, l.c. 221, 222, 223, said:

"* * * The question presented is, whether, under the designation of franchises, the immunity from taxation upon its property possessed by the railroad company accompanied the property in its transfer to the defendant, or whether that immunity was a mere personal privilege of the company, and therefore, not transferable to others. * *
* * * * *
The condition of the exemption in terms makes the exemption applicable to the property only so long as that belongs to the debtor. A similar condition attached by its terms to the exemption from taxation of the property of the railroad company here, and a like result must be deemed to have followed its change of ownership. In our judgment, the

exemption ceased when the property of the company passed to the defendant.

"Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction."

A statute imposing a corporation organization tax upon a new corporation is the exercise of the police powers of the State.

In a memorandum supplied by counsel for the Wabash Railroad Company, they take the position that because the old Wabash Railway Company was liquidated, and its assets sold under the decree of the Federal Court, with the consent of the Interstate Commerce Commission, the company is not required to qualify as a new corporation to do business in this State. We do not believe that any provision of the Interstate Commerce Act or anything adjudged in the Federal Court decree gives basis for any such claim.

The States never surrendered to the Federal Government their sovereign right to the exclusive exercise of police powers within each individual State. Under the subject of Constitutional Law, 12 C.J., page 910, states the following text.

"Under the American constitutional system, the police power, being an attribute of sovereignty inherent in the original states, and not delegated by the federal constitution to the United States, remains with the individual states. * * * "

The Supreme Court of the United States had before it the case of Chicago, Rock Island & Pacific Railway Co., vs. State of Arkansas, reported in 219 U.S. Rep., page 453, on the question of the right of a State to impose conditions in the exercise of its police powers in regard to the State law requiring certain equipment of railway trains, to the effect that no railroad company engaged in business in the State of Arkansas should equip any of its freight trains with a crew of less than six trainmen. The railroad named, neglected to obey this law. The State filed two suits against the railroad company asking a judgment in each case against the company for \$500. The company filed in each case both an answer and a general demurrer. The Supreme Court of Arkansas held the company liable on appeal. The case then went to the United States Supreme Court by writ of error. The Supreme Court in its opinion discussed many cases involving the same legal principles. In affirming the judgment of the Supreme Court of Arkansas to the effect that the requirement of the statute of Arkansas was a proper exercise of its police power, and that the statute was constitutional, the Court, 1.c. 465, said:

"The principles announced in the above cases require an affirmance of the judgment of the Supreme Court of Arkansas. It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the safety of all engaged in business or domiciled within its limits. Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the State. * * * "

Honorable Wilson Bell

December 19, 1945

There are many other decisions by the Supreme Court of the United States to the same effect, and many decisions from the highest Courts in nearly all the States to the same effect. But we believe the above cited cases will suffice here on the point.

We believe that before the Wabash Railroad Company could claim tax exemption under the proviso of said Section 113, supra, or under the old Section 5074, R.S. Mo. 1939, which was the statute in effect when this controversy arose, it would have to show that the said company had constructed its lines of railroad now operated by it, prior to April 21, 1891. This it cannot do.

The Supreme Court of Missouri, the highest Courts of other States, the United States Supreme Court, and the text writers of the law, hold uniformly that statutes creating exemptions of persons or property from payment of taxes must be strictly construed against such exemptions.

59 C.J. 1135, under the subject of "Construction of Statutes", states the rule as follows:

"Exemptions. In pursuance of the beneficent public policy which favors equality in the distribution of the burdens of government, all exemptions of persons or property from taxation are to be construed strictly against the exemption; * * * "

51 C.J. 392, under the subject of "Taxation" further states the same rule as follows:

"Unlike the rule of liberal construction which has been generally adopted with reference to exemptions from levy and sale for the payment of debts, an alleged constitutional or statutory grant of exemption from taxation will be strictly construed. * * * "

In the case of B.P.O.E. vs. Koeln, 262 Mo. 444, 1.c. 445, our Supreme Court in following the same rule of strict construction of exemptions, held as follows:

December 19, 1945

"* * * 'It must be conceded to the state that whether a tax-exempting clause be viewed from the standpoint of the State down to the people, or from the standpoint of the people up to the State there must be unbending and inviolate rules which as sure words of the law are always to be reckoned with; and those rules (from the standpoint of the State) are that an abandonment of the sovereign right to exercise the vital power of taxation can never be presumed. The intention to abandon must appear in the most clear and unequivocal terms * * * '".

In the case of State ex rel. Y.M.C.A. vs. Gehner, 11 S.W. (2d) 30, l.c. 34, our Supreme Court upheld the rule by saying:

"'In the construction of laws exempting property from taxation it is a cardinal principle that they must be strictly construed. As a rule all property is liable to taxation, exemption, the exception, and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. It is in no case to be assumed that the law intends to release any particular property from this obligation; and no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption.' * * * '".

CONCLUSION

1) It is, therefore, the opinion of this Department that the new corporate entity, the Wabash Railroad Company, organized under the laws of the State of Ohio on September 2, 1937, should be licensed as provided for in Section 5074, R.S. Mo. 1939, now Section 113, Laws of Missouri, 1943, page

December 19, 1945

470, and should pay into the State Treasury of Missouri the incorporating tax required by said Sections, together with the fee for the issuance of a certificate authorizing it to do business in this State.

2) That your Department is not authorized by law to accept the filing of the annual registration, statement, and anti-trust affidavit required by Sections 5085, 5086 and 5087, R.S. Mo. 1939, now Sections 114, 115 and current sections, Laws of Missouri, 1943, l.c. 471, 472, or furnish the blanks for such purpose as provided by Section 5096, R.S. Mo. 1939, now Section 112, Laws of Missouri, 1943, l.c. 473, unless and until said new Ohio corporation, to-wit: the said Wabash Railroad Company, is licensed to do business in this State.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

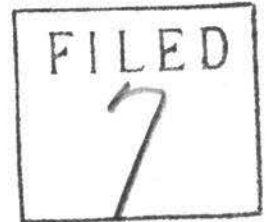
APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

COUNTY PURCHASES: No statute requiring county court to advertise for bids in purchase of supplies.

February 7, 1945.



Honorable Davis Benning
Acting Prosecuting Attorney
Pike County
Louisiana, Missouri

Dear Mr. Benning:

Under date of January 30, 1945, you wrote this office requesting an opinion as follows:

"Sections 13924, 13925, 13926 and 13927 being a part of Article 13 of Chapter 100 of the Revised Statutes of Missouri 1939, relate to the matter of the purchase of supplies by the County Court of certain counties, and the penalty for failure to comply with the terms of said sections. Pike County, Missouri, is a county containing a population of between 17,00 and 18,000, and I would appreciate an opinion from your office as to whether the terms of the above numbered sections are applicable to Pike County, Missouri.

"If in the opinion of your office, the above sections are not applicable to Pike County, are there any provisions in the statutes relating to the purchase of supplies by the County Court whereby it is provided that said supplies shall be purchased only after advertisement for, and the receipt of bids, that would be applicable to Pike County?"

The sections of the statute referred to in your letter were enacted in 1931. They are a portion of House Bill 514, approved April 16, 1931, and shown in Laws of Missouri, 1931, page 292 et seq. The title to the act is as follows:

"AN ACT to provide that the county court of counties now or hereafter having a population of not less than ninety-five thousand inhabitants, and not more than one hundred and fifty thousand inhabitants, as shown by the last preceding decennial national census, may, under such conditions and upon the terms prescribed in this act, issue negotiable notes payable in not more than one year to be paid out of current revenue of the year, providing for a board of estimates to estimate the revenue, and prescribing the duties of the board, providing for the sale of the promissory notes and the registry thereof, and providing that the county court shall provide for the purchase of all supplies, including all printing, and providing that any purchase of supplies or having any printing or advertising done otherwise than as provided in this act, shall be unlawful, and providing a penalty for the violation of the act, with an emergency clause."

By the title and the provisions of the act it applies only to counties having the population mentioned in both the act and the title. Inasmuch as Pike County does not come within this classification these sections of the statute should not be applicable to a county having the population of Pike County.

There are no other general statutes which require the county court to advertise for bids when purchasing supplies.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WOJ:EG

COUNTY:

Construction of Sec. 8485, R.S. Mo. 1939,
in view of facts stated in request.

ROADS AND BRIDGES:

July 10, 1945

Honorable Paul Boone
Prosecuting Attorney
Ozark County
Gainesville, Missouri

7/19
FILED
10

Dear Mr. Boone:

This will acknowledge receipt of your request under date of July 2, 1945, which reads:

"I would appreciate your opinion concerning a small strip of road and a bridge in this county.

"The road and bridge in question are a part of the road system leading from Dora, Mo. to West Plains, Mo. In the year 1927 a new bridge was constructed across the North Fork River to replace an old bridge, the new one being constructed approximately 100 feet southwest of the old bridge. No right of way was secured for the new construction. The bridge was financed by public subscription. In the year 1934 a change was made in the county road approaching this bridge on the northwest side of the river, and approximately 400 feet of new road was constructed which would intersect the old road at the bridge on the northwest side of the river. No right of way was secured from the owner of the land for the change of road, nor was a change ordered by the County Court.

"The road and bridge in question are situated within the Mark Twain National Forest, and in the year 1934, after the new road was constructed, the road and bridge were taken over, for the purpose of maintenance, by the U. S. Forest Service,

and have been maintained and kept in repair by use of the money provided by U. S. Forest Service since the year 1934. The bridge was kept in repair by County money between the years 1927 and 1934, when repair was needed.

"This road and bridge have been considered as public highway since date of construction and have been used as such since the date of construction by the public, including U. S. mail route, school bus, and all travel between Dora and West Plains.

"In the year 1941 there was some correspondence between the owner of the land and the Forest Supervisor at Springfield, Mo., regarding right of way for the road and bridge, and in a letter addressed to the Forest Supervisor, Springfield, Mo., dated March 5th, 1941, the owner of the land made the following statement,

'We have no objection to action being taken to clear a title for your right of way but the government must pay \$500.00 for that right of way and bridge. The bridge cost much more money than that amount and is so substantially built that it can be used without a bit of additional strengthening.

'You are also aware of the fact that they cut through the 40, taking off the valuable corner, without our knowledge or consent a thing that should not have been done, and we have only waited filing a claim with the Court of Claims because we felt that the matter could be settled without that.

'If you want to draw up a deed describing the right of way including the bridge, of the proper width clear around the mountain and get us a check for \$500.00 we will sign the deed and feel alright about it and I think that is the thing to do.'

July 10, 1945

"In answer to the above statement the Forest Supervisor by letter dated April 9, 1941, made the following statement,

'For your information in regard to submission of a bill to the U. S. Court of Claims, it is believed that this is a privilege which you can elect to follow since no funds are available to this Forest which we can assign to meet the expense of such a claim.'

"There has been no further correspondence or communication with the land owner regarding the road and bridge, although the U. S. Forest Service has continued to maintain same and the public has continued to use the road and bridge to this date.

"It is now necessary to rebuild the bridge, but since it will take a large sum of money to do so, the U. S. Forest Service desires to have the matter of right of way cleared before such a sum is expended.

"May I have your opinion as to whether or not the road and bridge have been legally established as a county road and bridge? It seems that the provisions of Section 8485 R. S. Mo. 1939 would apply, however your opinion on the matter is desired."

Apparently the old bridge and road were constructed on orders of the County Court, since you state they were a part of the road system leading from Dora to West Plains, Missouri. However, you do not state that the new bridge was ordered by the County Court. You do state the 400 feet of new road was not constructed as a result of the order of the County Court, and by implication we might assume that the new bridge was ordered by the County Court, if you had not informed us that it was built from public subscription. Be that as it may, in view of citations hereinafter quoted we are of the opinion that the new bridge, constructed in 1927 and maintained continuously thereafter from public funds and continuously traveled by the public after the construction of said bridge, is established as a county bridge.

However, we cannot say so much for the new road, even if it were constructed over the old roadbed, for the reason that in 1941 notice was given, as shown by your letter, that the owner did not intend to give the land to the public for a

public highway but that he retained the fee to said land. However, he did express his willingness to convey said land for \$500.00. Under Section 8485, R. S. Mo. 1939, all roads that have been used as public highways by the public for 10 years continuously, and where there has been expended public money or labor during such period, said roads shall be deemed to be established as public roads. Section 8485 reads:

"All roads in this state that have been established by any order of the county court, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads; and nonuser by the public for ten years continuously of any public road shall be deemed an abandonment and vacation of the same."

It was held in *State v. Haworth*, 124 S. W. (2d) 653, 1.c. 655 and 656, that the prescriptive period applying to the new road would begin to run when the public began to use it and would not be cumulative with the period of years the old road was used. In so holding the court said:

"If the act of Tom Laidlaw's father in fencing off the old road in 1884 was hostile to the right of the public to use this road and the public took a new route across the land in question then the prescriptive period applying to the new road would begin to run when the public began to use it, to-wit, 1884 and would not be cumulative with the period of years that the old road was used.
* * * * "

Since the new road was constructed in 1934, and in 1941 the owner of said land over which the road was constructed gave notice that he was not releasing said land, this amounted to a mere implied permission to use said land, since the statutory ten-year period had not run upon receipt of said notice.

It has been held that the public may acquire the right to use a highway even though it has not been opened by the County

Court as a public highway. The court in *State v. Haworth*, supra, l.c. 656, said:

"Respondent contends that notwithstanding the provisions of the laws of 1887, page 257, section 57, the highway in question became a public highway by implied dedication or estoppel in pais. While it has been held that regardless of the Laws of 1887, page 257, section 57, that the public may thus acquire the right to use a road as a public highway even though it not be opened by order of the county court and though no public money or labor has been expended thereon. (Cases cited) * * * 'The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation.'

"The sole test in determining whether or not there has been a dedication, is the intent on the part of the owner of the land to dedicate the same to public use as a highway. This intent can be either express or implied but if the intent to dedicate is absent there can be no valid dedication."

In *Rosendahl v. Buecker*, 27 S. W. (2d) 471, in holding that if the owners knew for over ten years that the road was being used by the public; that there had been actual and continuous use for a prescribed period with the knowledge of the owners; and that the law would presume the grant unless the owners could show it was merely permissive, the court said:

"In the light of the facts as we have set them out above the result in this case hinges upon the question as to whether or not the use by the public of this roadway, for the number of years it has been in use, was adverse to the claim of defendant and those under whom he claims, or was permissive; if it was adverse, plaintiff has made out his case and the judgment of the circuit court

should be sustained. If it was merely permissive and plaintiff and the public were merely, in a sense, licensees, then the defendant, as owner, could revoke the license at any time, and that without rendering him liable to action.

"The burden of proof rests with the defendant to show that the first use of the road was permissive. *Anthony v. Building Co.*, 188 Mo. 704, 87 S.W. 921; *Gerstner v. Payne*, 160 Mo. App. 1.c. 295, 142 S.W. 794; *Novinger v. Schoop* (Mo. Sup.) 201 S.W. 64; *Strong v. Sperling*, 200 Mo. App. 66, 205 S.W. 266.

"It is our view, and we must so rule, the appellant, defendant below, under the evidence in this case, has failed to carry this burden as is required by law. There can be no question under the record in this case but that the owners of the land throughout all of the years back prior to 1860 knew that the road was being used by the public, and where there has been actual and continuous use for the prescribed period with the knowledge of the owner, the law raises a presumption of grant, unless the owner can show that the use is merely permissive. And while such knowledge and consent of the owner would not of itself vest and establish a prescriptive easement without evidence to explain how it became such, the use would raise a presumption that it was adverse under a claim of right and shifts the burden to the defendant to show that it was by permit or some license.

"After the year 1847, when the limitation period of actions to recover real property was reduced from twenty to ten years, our supreme court in *State v. Wells*, 70 Mo. 635, specifically held that 'ten years adverse accupancy and use of a road by the public would be sufficient, if acquiesced in by the owner, to vest in the public an easement in the road and cause it to become a highway.' This continued to be the law until the passage of the Act of 1887, now section 10635,

Rev. St. of Mo. 1919, which, in addition to user by the public for ten years continuously, now requires that public money be spent on the road before the same shall be held to be a road by prescription. Lee v. Ry. Co. 150 Mo. App. 175, 129 S.W. 773. This act, now section 10635, has been specifically held not to operate retrospectively. Leiwke v. Link, 147 Mo. App. 19, 126 S.W. 197."

The courts have also held that upon showing an open, continuous, visible and uninterrupted use for a period of more than ten years, the burden is cast upon the other party to show its use was merely permissive. In Wallach v. Stetina, 28 S.W. (2d) 389, 1.c. 391, the court said:

"We think the evidence sustains the finding of the trial court to the effect that the claim of the use of this road by prescription shows an open, continuous, visible, and uninterrupted use for a period of more than ten years. Under these circumstances, the burden is cast upon the defendant to show that its use was permissive. In view of the decision of the Supreme Court above referred to, transferring the case to this court, its proper solution at first seemed rather difficult. * * * *"

Furthermore, the courts have held that it becomes a question of fact for the jury to determine whether a road is a public road. In Morris v. Atlas Portland Cement Company, 19 S.W. (2d) 865, the court said:

"Whether or not the land, by reason of the proof of its use and maintenance for the time required by the statute (section 10635, supra), became a public road, was a question of fact for the trial court and its finding in that regard will not be disturbed on appeal (Bingham v. Kollman, 256 Mo. 573, 165 S.W. 1097).

"Technically considered, there is no assignment of errors in this case; but the narrow limit of the issue involved and its character, affecting as it does the establishment of a public highway, are deemed sufficient to entitle it to a review and determination."

July 10, 1945

Another decision which will throw some light on the questions involved herein is *Garbee v. St. Louis-San Francisco Ry. Co.*, 290 S.W. 655, l.c. 657, 658, wherein the court held that a road may be given the status of a public road without the order of the County Court. Also, that it is not essential that public money be expended upon it each year. In so holding the court said:

"Defendant contends that the order of the county court establishing the road as a public road is void and without effect because it does not recite the giving of notice of petition or application for the establishment of the road as was required by section 7797, R.S. 1889. This section has come down without substantial change and is now section 10626, R.S. 1919. But we do not deem it necessary to rule the point made. A road may be given the status of a public road without having been so established by petition and court order. Section 10635, R.S. 1919, among other things provides that all roads that have been used as such by the public for 10 years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads. Such was in effect the statute law in 1894 when the public began the use of the road here in question. See section 7847, R.S. 1889. And it is not absolutely necessary that public money or labor be expended upon the road each and every year for such 10-year period. It is sufficient if the road is kept in substantial repair. *State v. Kitchen*, 205 Mo. App. 31, 216 S.W. 981."

(See also *State v. Kitchen*, 296 S.W. 981.)

We assume that the arrangement whereby the U. S. Forest Service has kept up the repairs upon the new bridge and road in question has in no way disturbed the interest of the county in said bridge and road.

In view of Section 8485, *supra*, and the foregoing authorities, it is the opinion of this department that the so-called new bridge constructed in 1927, as a part of the public highway, is a public bridge and belongs to the county, since it had been continuously used by the public for more than ten successive

July 10, 1945

years prior to 1941. However, the new road constructed in 1934 does not belong to the county, for the reason notice was given in 1941 by the owner of the land over which the new road was constructed, prior to the public using said road for ten successive years, to the effect that no right of way was secured for said road, but that he would gladly convey title for \$500.00. By this notice we conclude that he merely gave the public a permission to the use of said road and did not release any interest held by him.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

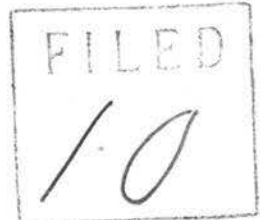
APPROVED:

J. E. TAYLOR
Attorney General

ARR:ld

TAXES: RE: Employees working in the Dr. Edmund A. Babler Memorial Park do not come within the provisions of the State and Federal Unemployment Compensation Act.

November 6, 1945



11/16

State Park Board
Jefferson City, Missouri

Attention: Mr. I. T. Bode

Gentlemen:

This will acknowledge receipt of your letter of August 31, 1945, requesting an official opinion of this department, which letter reads as follows:

"I have been requested by the Board of Trustees of the Edmund A. Babler Perpetual Trust Fund to ascertain whether or not it is necessary for them to take deductions for Social Security for employees employed out of the trust fund and who work full time on the Park."

The employees referred to in your request are those employed by the Board of Trustees working in the state park on the maintenance, beautification and enlargement of said park and whose salaries are paid by the Trustees from the income derived from the Trust fund.

In answering your request, it is necessary that we examine the Dr. Edmund A. Babler Perpetual Endowment Trust Fund Agreement as well as laws and deeds conveying lands now known as the "Dr. Edmund A. Babler Memorial Park".

Mr. Jacob L. Babler originally made an outright conveyance to the State of Missouri of certain land in St. Louis County to be used as a State Park and to be known as the "Dr. Edmund A. Babler Memorial Park". Subsequent thereto, Mr. Babler expressed a desire to set up a trust fund for the purpose of helping maintain, beautify and enlarge said park. So thereafter on June 23, 1937, a deed was executed by Honorable Lloyd C. Stark, Governor of Missouri; Roy McKittrick, Attorney General of Missouri, and Wilbur C. Buford, the Game and Fish Commissioner of Missouri, in behalf of the State of

Missouri under and by virtue of an act of the Legislature passed on May 4, 1937 (see P. 514, Laws 1937) conveying to Jacob L. Babler the land he had formerly conveyed to the State of Missouri for said park, with the reservation that the grantor, his heirs, executor and administrators shall reconvey the same land to the above named state officers for the use and benefit of the State of Missouri subject to the terms of the Dr. Edmund A. Babler Perpetual Endowment Trust Fund Agreement.

Thereafter on the 23rd day of June, 1937, Jacob L. Babler conveyed the same land to the above named state officers for the use and benefit of the State of Missouri subject to the terms and conditions of the Dr. Edmund A. Babler Perpetual Trust Fund Agreement. Under said Trust Fund Agreement and deed to the State of Missouri, the Board of Trustees is authorized to use and expend all or any part of the net income and revenue derived for maintenance, beautification, further development and possible enlargement of said park in any manner and for the purpose of defraying the costs of such improvements as the State of Missouri has not made or contributed, said Board of Trustees is further authorized to construct, build and maintain roads and walks, to provide suitable playgrounds for children, to construct, plan and perfect playing fields and other recreational facilities where adults may enjoy games of sport; also to erect construct, equip and maintain buildings as may be necessary in the opinion of the Trustees for carrying out the object of the Trust. The Trustees are further directed to supervise and manage said park, make rules and regulations that govern said park, fix fees for using facilities of the park and engage employees and fix salaries of the manager and superintendent of said park and other assistants, attendants or care-takers whose services are necessary for maintenance, beautification and further development of the park. They also shall have full and complete charge of all concessions and concession buildings in the park with full power to fix and regulate and collect all charges and rentals. The Trust Fund Agreement further provides that the state shall assume no obligations to contribute to the maintenance, upkeep and improvement of the park as long as the Trust Fund Agreement is operative nor shall the state be liable for any debt liability or obligation incurred by said Trustees. Furthermore, that if the income from the Trust Fund is insufficient to meet the expenses or maintenance of said park including salaries of Trustees and employees and necessary repairs the Trustees at their option may surrender possession of the park to the state and in such event the provisions of said Trust Fund Agreement shall no longer be effective and thereafter the State shall exercise the same jurisdiction over said park as it does over other state parks.

In view of the foregoing conditions contained in the deed, whereby Jacob L. Babler reconveyed said land to the State of Missouri and the conditions contained in the Trust Fund Agreement, we are of the opinion that for most purposes the Board of Trustees have full control of said

park so long as the Trust Fund Agreement is in effect. However, the sole purpose of the Trust Fund Agreement is to provide funds and supervision for the maintenance, improvement and enlargement of said park for the benefit of the State of Missouri and not for any private interests.

Under Section 1426, Title 26, subsection (b) of the Federal Unemployment Act, we find employment defined as follows:

"(b) Employment. The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except--"

* * * * *

"(7) Service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 1410;

"(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;"

* * * * *

The State Unemployment Compensation Act found in Laws, 1943, pages 924, 925 and 926, Section 9423 defines Employment and further specifies that employment shall not include the following:

* * * * *

"(1) 'Employment'.

* * * * *

"(6) Shall not include:

* * * * *

"(E) Service performed in the employ of this state or of any political subdivision thereof or of any instrumentality of this state or its political subdivisions;

"(F) Service performed in the employ of a corporation, community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;"

* * * * *

One of the primary rules of statutory construction is to ascertain the law-makers' intent from words used, if possible, and put on the language of the Legislature, honestly and faithfully, its plain and rational meaning and promote its object and the manifold purpose of the statute. (See Artophone Corporation vs. Coale, 133 S. W. (2d) 343, 345 Mo. 344.

It is also a well established rule of statutory construction that taxing statutes shall be construed strictly against the taxing authority. In A. J. Meyer and Company vs. Unemployment Compensation Commission, 152 S. W. (2d) 184, 348 Mo. 147, the court said: (l. c. 191)

"(7,8) As we see it, there is no escape from the conclusion that the unemployment compensation act includes a taxing statute, and 'it is well established that the right of the taxing authority to

levy a particular tax must be clearly authorized by the statute, and that all such laws are to be construed strictly against such taxing authority.' State ex rel. Ford Motor Co. v. Gehner et al. 325 Mo. 24, 27 S. W. (2d) 1, loc. cit. 3, and cases there cited. See also State v. Hallenberg-Wagner Motor Co., 341 Mo. 771, 108 S. W. (2d) 398, loc. cit. 400; State ex rel. Western Union Telegraph Co. v. Markway, 341 Mo. 976, 110 S. W. (2d) 1118, loc. cit. 1119; Artophone Corp. v. Coale et al., 345 Mo. 344, 133 S. W. (2d) 343, loc. cit. 347; State v. Shell Pipe Line Corp., 345 Mo. 1222, 139 S. W. (2d) 510, loc. cit. 519. See also, Barnes v. Indian Refining Co., 280 Ky. 811, 134 S. W. (2d) 620, and Texas Company v. Wheelless, 185 Miss. 799, 187 So. 880, cited supra. In these cases it was held that the unemployment compensation act under consideration was a taxing statute and should, in that respect, be strictly construed."

* * * * *

(See also American Bridge Co. v. Smith, 179 S. W. (2d) 12, 1c. 15, point 4 and 5.)

However, there is another rule of statutory construction that might be applicable in the instant case, that is, that the general rule that tax exempt statutes are to be strictly construed in favor of the government does not apply to exemption statutes relieving corporations, organized and operated exclusively for religious or educational purposes where no part of the net earning inures to the benefit of any private share-holder, from paying taxes for services rendered by employees for such corporations. The reason for the rule being that it should be liberally construed so as to further beneficent purposes. In Jones v. Better Business Bureau of Oklahoma City, 123 Fed. (2d) 167, 1.c. 769, the court said:

"(1,2) While the general rule is that tax exempt statutes are to be construed strictly in favor of the government, the rule does not apply to exemption statutes of the character here involved. Such a statute should be liberally construed so as to further rather than hinder its beneficent purpose. The purpose of this exemption is to encourage religious, charitable, scientific, literary, and educational

associations not operating for the profit of any private shareholder or individual."

* * * * *

We cannot see that the Board of Trustees herein is the same as the State or any political subdivision thereof, however, it might be considered an instrumentality of the state or its political subdivisions. Neither does such employment, strictly speaking, amount to service performed in the employ of a corporation, religious, charitable scientific, literary or educational purpose. In *Unemployment Compensation Commission v. Wachonia Bank and Trust Co.*, 2 S. W. (2d) 592, 1.c. 595 and 596, the court lays down the general principle as to what elements constitute an instrumentality of the government and says:

"(7-9) Perhaps it is impossible to formulate a satisfactory definition of the term 'instrumentalities of government' which would be applicable in all cases. At least it is unwise to undertake to do so. Each case must be determined as it arises. Generally speaking, however, it may be said that any commission, bureau, corporation or other organization, public in nature, created and wholly owned by the government for the convenient prosecution of its governmental functions, existing at the will of its creator is an instrumentality of government; and that any state created corporation or association, privately owned, and organized and doing business primarily for profit, which is granted certain incidental duties or privileges by the Federal Government is not. The enjoyment of a privilege conferred by either a national or a state government upon an individual, association or corporation operating primarily for profit in a private enterprise, even though to promote some governmental policy, does not convert such individual, partnership or corporation into an instrumentality of government. *Unemployment Compensation Commission v. Insurance Co.*, 215 N.C. 479, 2 S. W. (2d) 584. * * *"

"(10,11) In the border line cases in which it does not clearly appear that the agency is or is not an instrumentality of government important factors, among others, which must be considered in determining that such agency is an instrument of government are: (1) It was created by the government; (2) it is wholly owned by the government; (3) it is

November 6, 1945

not operated for profit; (4) it is primarily engaged in the performance of some essential governmental function; (5) the proposed tax will impose an economic burden upon the government, or it serves to materially impair the usefulness or efficiency of the agency or to materially restrict it in the performance of its duties. While perhaps, no one of these factors is sufficient, and the presence of all is not required, to constitute any given agency an instrumentality of government, the presence or absence of either requires serious consideration. If the tax in fact is to be paid out of government money, thus placing an economic burden on the government, or if it constitutes an undue interference with the agency in the performance of its governmental functions, the agency may usually be classed as a governmental instrumentality."

* * * * *

In *Fall City Brewing Co. v. Reeves*, 40 Fed. Supp. 35, l.c. 39, the court held that the post-exchange at Ft. Knox, Ky. is an instrumentality of the United States and in that decision defined instrumentality as follows:

"* * * The question to be decided therefore is whether or not the Fort Knox Post Exchange, as organized and operated as hereinabove set out, is an instrumentality of the United States within the meaning of the Buck Resolution. 'Instrumentality' is defined by Webster as 'a condition of being an instrument; subordinate or auxiliary agency; agency of anything as means to an end.' The same word is defined in 32 Corpus Juris, page 947, as 'anything used as a means or an agency; that which is instrumental; the quality or condition of being instrumental.' * * *"

There is no question but that the state has the power and authority to create an agency for the purpose of exercising its governmental powers and in one sense that is what happened in the instant case. The Legislature, by statute, directed its officials to convey the land known as the "Dr. Edmund A. Babler Memorial Park" to Jacob L. Babler with the reservations that he shall convey same to the same state

November 6, 1945

officers for the benefit of the state subject to the Endowment Trust Fund Agreement which in effect was an approval of said Trust Fund Agreement. In other words, by that act it delegated what authority it possessed as owner of said land to the Board of Trustees as provided in the Trust Fund Agreement. In such case the contents of said Trust Fund Agreement became as much a part of that act passed by the General Assembly, (Laws 1937, p. 514) as if it had been incorporated therein. The state now holds the title to said land subject only to the terms of said trust fund agreement. Furthermore, under the law and the trust fund agreement the park is operated not for profit to any individual shareholder but for the sole benefit of the State of Missouri and its citizens and any profit derived therefrom must be used solely for the purpose of maintenance and beautification of said park. The only individuals who in any manner will personally benefit are the trustees who are entitled only to compensation for acting as trustees under the Trust Fund Agreement.

CONCLUSION

It is, therefore, the opinion of this department that said employees working in the "Dr. Edmund A. Babler Memorial Park" do not come within the provisions of the State and Federal Unemployment Compensation Act. Such employment comes within the decisions hereinabove quoted, defining employment by an instrumentality of the government. We therefore conclude that it is not necessary for said Board of Trustees to take deductions for social security for said employees out of the said Trust Fund.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General.

ARH:mw

COUNTY COURTS: Authority to appoint agent under Sec. 17766,
R. S. Mo. 1939, and to provide compensation
for discharge of duties under such appointment.

February 26, 1945

FILED

Honorable G. R. Breidenstein
Prosecuting Attorney
Kahoka, Missouri

Dear Sir:

Reference is made to your letter under date of
February 17, 1945, requesting an opinion of this office
upon the following facts:

"On February 5, 1945, the County Court
of Clark County, Missouri, made and
entered of record the following order.

"The Court having taken Judicial Notice
of the Act of Congress, being an Act to
amend and supplement the Federal-Aid
Road Act approved July 11, 1916, approved
December 20, 1944 and to be cited as the
"Federal-Aid Highway Act, finding that it
is advisable and to the best interests of
Clark County to have an authorized agent
to represent Clark County, in co-operating
with State officials, and local govern-
mental agencies under the supervision of
the Public Roads Administration to the end
that Clark County may properly present its
claims to the benefits of said Act, hereby
appoint Jesse L. England, as Agent for
Clark County, Missouri under the provisions
of Section 13766, Revised Statutes of Mis-
souri, 1939, or Amendments thereto, for the
aforesaid purposes, said Jesse L. England,
to serve as such agent at the pleasure of
the Court, and to be paid therefor the sum
of \$100.00 per month for which vouchers
therefor are ordered to issue and for such

February 26, 1945

reasonable expenses as may be incurred by him in the performance of his capacity of Agent for Clark County while absent from Kahoka, Missouri.'

"This order was made without my knowledge. In fact its existence came to my attention only yesterday. I was not consulted by the court in regard to the legality of the order. I have read section 13766 referred to in the order and after considerable deliberation I cannot see wherein that section authorizes any such order or appointment on the part of a county court. I do not know of any buildings the court contemplates erecting or any contracts to be let. In fact the reading of the order does not refer to the things mentioned in this section of the statute but rather refers to some work which the Agent is supposed to do to see that this county gets some benefits from the Federal-Aid Highway Act.

"I want to ask your opinion if the county court can make such an order and appointment and expend county funds for that purpose. If so from what money or funds should this be paid? There was no allowance made for this in the official budget."

The appointment of the agent described in your letter was made under the authority of Section 13766, R. S. Mo. 1939, reading as follows:

"The county court may, by an order entered of record, appoint an agent to make any contract on behalf of such county for erecting any county buildings, or for any other purpose authorized by law; and the contract of such agent, duly executed on behalf of such county, shall bind such county if pursuant to law and such order of court."

February 26, 1945

It is apparent that under the plain terms of the statute quoted the county court is authorized to delegate authority to an agent to execute a contract on behalf of the county. This delegation of authority does not, of course, permit such agent to determine the terms of such proposed contract, as this duty is imposed upon the county court in the discharge of its duties as general fiscal agent for the county. We, therefore, are of the opinion that such agent can merely discharge ministerial duties relating to the formal execution of a proposed contract.

The order made by the county court in the present instance does not by its terms come within the purview of Section 13766, R. S. Mo. 1939, as it in effect is a contract by Clark County with a person designated as agent to perform certain duties on behalf of Clark County, and is not the appointment of an agent to enter into a contract with some third party on behalf of Clark County, such as is contemplated by the statute mentioned.

The question then presents itself of whether a contract made by the county court with a person to enter into negotiations looking to the receipt of federal aid for highway construction is authorized. Employment contracts of this type are controlled by the decision rendered by the Missouri Supreme Court in the case of *Blades et al. v. Hawkins et al.*, 240 Mo. 187, from which we quote, in part:

"The more important proposition, and the one chiefly controverted, is as to the power of the county court to employ an expert accountant to audit the public records and the accounts of present and prior officials. Its power to do so must be found in some express statutory grant, or else implied as essential to the proper execution of powers expressly granted or duties expressly imposed. Section 6759, Revised Statutes 1899, (now Section 3349, R. S. Mo. 1939) prohibits counties and other municipal bodies from making any contracts not within the scope of the powers of the municipality or expressly authorized by law. This provision is but declaratory of the common law; for these public corporations never have been deemed

February 26, 1945

to possess authority to contract, or do any other act, unless the power was granted by statute or could be implied because necessary and incidental to the due performance of powers granted or duties enjoined. This doctrine applies to county courts and commissioners, as well as to the governing bodies of other subordinate political corporations. (Wolcott v. Lawrence Co., 26 Mo. 277; Sturgeon v. Hampton, 88 Mo. 204.) There is in our statutes no grant of authority to a county court to employ an expert to audit and examine the books and accounts of the county and its officers. Hence, if this authority existed in the present instance, it was because the law implied it as essential to the due exercise of powers specifically vested in the county court by statute or the performance of a duty specifically required of said tribunals. The courts are conservative in implying powers not expressly given. One limitation imposed by law on these implications is that no power will be implied to belong to a public corporation unless it is cognate to the purpose for which the corporation was created."

In the case cited payment for the services rendered was upheld on the ground that since the duty to audit the accounts of the county officers was imposed upon the county court, the implied power was vested in the court to employ such agents as were necessary to make the required examination.

The contract under consideration relates to matters affecting public highways and the possibility of securing federal aid for their construction and maintenance. Duties in regard to these matters have not been imposed upon the county courts by statute and are not, in our opinion, reasonably implied because necessary and incidental to the due performance of powers granted or duties enjoined. This is particularly true in view of the statutory and constitutional provisions establishing the state highway commission and the county highway commission, evidencing an intention on the

February 26, 1945

part of the legislature that these bodies represent the counties in such road matters. The Federal Aid Act, referred to in the order of the County Court of Clark County, also provides that the respective state highway commissions shall represent their states in determining the amount of federal aid to be granted them.

CONCLUSION

In the premises, we are of the opinion that the order referred to in your inquiry is not one which the County Court of Clark County was authorized to enter into under Section 13766, R. S. Mo. 1939, as the duties delegated to the person employed thereunder are not duties imposed upon the county court by statute, nor are they such duties as may be reasonably implied because necessary and incidental to the due performance of powers granted.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

WFB:HR

TAXATION : Situs of personal property of
: business and manufacturing cor-
PERSONAL PROPERTY ASSESSMENT: porations/determined by location
for assessment of personal property on June 1,
under Section 10958, R.S. Mo.1939.

March 9, 1945

3-13
FILED
//

Honorable D. W. Breid
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Breid:

This will acknowledge receipt of your inquiry
of February 26, 1945, relative to the following:

"The Crane Company, a plumbing supply
house it seems is an Illinois Corpora-
tion owning and operating a large
branch in St. Louis, Missouri, owns a
number of motor vehicles for the use
of their salesmen, one of which lives
in Union, Franklin County, Missouri,
and keeps the Company car here at all
times. Our Assessor has assessed the
car in Franklin County, and the Crane
Company objects to this assessment,
claiming it should be assessed in St.
Louis."

We have a statute governing the taxation and as-
sessment of personal property of business and manufac-
turing corporations as follows:

Section 10958, R.S. Mo. 1939, provides that the
situs of personal property of business and manufactur-
ing corporations shall be taxable in the county in which
such property may be situated, on the first day of June
of the year for which such taxes may be assessed. It
also provides that said corporation owning personal prop-
erty which is situated in any other county than the one
in which said corporation is located, shall make return
thereof to the assessor of such county where situated.

We find no Supreme Court ruling on the question

presented by you. However, the case of State ex Rel. White vs. Timbrook's Estate, 145 Mo. App. 368, 129 S.W. 1068, holds that while the presumption is, in the absence of statute, that the situs of personal property for taxation purposes is at the domicile of the owner, it will give way where it appears that the property has actual situs apart from his domicile. This decision construes the law with reference to assessing the property of individuals not corporations.

Also, in Volume 39, Words and Phrases, Permanent Edition, page 350, the case of Brock and Co. vs. Board of Supervisors of Los Angeles County, 8 Calif. (2d) 286 tal., 65 Pac. (2d) 791, 793, holds that the word "situated" as used in the statute providing that taxable property shall be assessed in the place in which it is situated, connotes a more or less permanent location or situs and the requirement of permanency must attach before tangible property which has been removed from the domicile of the owner will attain a situs elsewhere. See also, 110 A.L.R., page 700, and note page 707; see also, Security Mutual Life Insurance vs. Reis, 76 Neb. 141, 106 N.W. 1037.

In the case of Allegheny County vs. Gibson, 90 Pa. 397, 35 American Rep. 670, the Court held that all personal property being within the county is taxable, though it might be intransitu. Strictly speaking personal property cannot be said to have a situs. It is situated wherever it might happen to be for the time being. In the case of Corn vs. City of Cameron, 19 Mo. App. 573, the Court held that the general rule is that tangible personal property is to be taxed at the place of residence. This is the general rule, though tangible personal property may be taxed where it is, irrespective of ownership, if the statute shall so provide. In the case of State ex rel. K.C., St. J. and C.B. R.R. Co., 55 Mo. 378, l.c. 388, the Court said:

"* * * This notion of the situs of personal property following the personal residence of the corporation, is a legal fiction, but is not an unbending and uncontrollable principle of law. It may be modified by the legislature. * * * "

While there is considerable authority supporting the

March 9, 1945

~~the~~ theory that personal property of a corporation should be assessed at the place of its main office, yet we believe that under our Missouri statute it was intended that the personal property be assessable in the county where situated on the first day of June.

CONCLUSION.

Therefore, it is the opinion of this department that the automobile used by the salesman of the corporation should have been assessed at the situs of the automobile on June 1, 1943, and if it was then located in Franklin County, Missouri, it could have been assessed there, and the corporation should pay the tax upon the same.

Respectfully submitted,

R. WILSON BARROW
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

RWB:ir

GENERAL ROAD DISTRICTS--
TAXATION

How road taxes may be levied
in road districts other than
special road districts under
township organization.

May 1, 1945



Honorable R. Kip Briney
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Mr. Briney:

Your letter of April 20, addressed to "Office of Attorney-General, State of Missouri, Jefferson City, Missouri," has been received and has been assigned to the writer to prepare the opinion requested in your communication.

Your letter states:

"Stoddard County is operating under township organization. Under the first sentence of Section 12, Article 10, of the new Constitution, the township board is clearly authorized to make a levy of thirty-five cents on each one hundred dollar assessed valuation for road and bridge purposes, but this thirty-five cents will not be sufficient for road and bridge purposes. The second sentence of Paragraph 1 Section 12 makes provision for an additional levy for road and bridge purposes, and in part says as follows:

"In addition to the above levy for road and bridge purposes it shall be the duty of the County Court, when so authorized by majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purposes to make an additional levy of not to exceed thirty-five cents on the one hundred dollar valuation * * *."

"It is the desire of the Township Board of Castor Township, Stoddard County, Missouri, to hold an election to test the sense of the voters upon the proposition of voting an additional thirty-five cents over and above the thirty-five cents authorized in the first sentence of Section 12. The question is: Is Castor Township a road district, general or special, within the meaning of this section? There is no contention that Castor Township is a 'special' road district, but it conclusively seems to me that Castor Township is a 'general' road district, as townships in counties having township organization and a county not having township organization must be a 'general' road district, otherwise this provision of the Constitution for 'general' road districts makes no sense.

"I have found no definition of a 'general' road district either in the Missouri Digest or Missouri Revised Statutes Annotated."

Your difficulty seems to be the question of determining the meaning of the word "general" as used in Section 12, Article 10 of the new Constitution of Missouri, as applied to road districts in counties having adopted township organization, as you express it, and whether Castor Township constitutes a road district.

The question of whether Castor Township, Stoddard County, Missouri, has within it only one road district or more than one road district is a question of fact.

Section 8814, Article 17, Chapter 46, R.S. Mo. 1939, under the Title of Township Organization -- Road Districts and Overseers, with respect to the formation of road districts is as follows:

"The township board of directors shall form the township into one or more road districts.* * *

Whether or not said Castor Township, Stoddard County, Missouri, has only one road district or more than one road district, would depend upon the record made by the board of directors of said township in that behalf. If the township

board formed the township into only one road district, the boundaries of said road district would be co-existent and co-extensive within the boundaries of the township itself. If, however, the township board may have formed more than one road district within the boundaries of the township, it would then be the duty of the County Court in such counties, when so authorized by a majority of the qualified electors of any of such road districts, one or more, as the case might be, general or special, voting thereon at an election held for such purposes to make an additional levy of not to exceed 35¢ on the \$100 assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as State and County taxes, and placed to the credit of the road district authorizing such levy, if and when such election may be called and held in the manner provided by law. It would be possible for one or more general or special road districts to have been formed, or to be formed, in said township. If no special road districts were formed by the township board, and only one road district remained, comprising the full boundaries of the township, it would be quite understandable that it would be referred to as a "general" road district, or if more than one road district were formed in said township, none of which were special road districts, they too could reasonably and intelligibly bear the name of "general" road districts.

We do not think the word "general" is of any special significance in construing the terms of Section 12, Article 10 of the new Constitution.

Webster's International Dictionary, page 1018, defines the word "general" as :

"* * * Pertaining in common to all. * * *
Opposed to particular or special. * * *"

The words "general" or "special" might very well be abridged or treated as surplusage in said Section 12 of said Article 10 of the new Constitution, and still leave the terms of the section quite clear as to what road districts may proceed to vote on an additional levy, wherein it states that "any" road district may so proceed to make such additional levy.

May 1, 1945

The matter would appear to be determined by the fact whether Castor Township is divided into one or more road districts. If only one road district is created, then Castor Township itself would comprise, so far as territorial lines are concerned, and in fact one road district. If, however, more than one road district has been created in said Castor Township, each road district would be an entity to itself, and could proceed, when authorized by law, to vote on such additional levy for itself at an election held in such township.

Section 23, Article 10 of the former Constitution of Missouri, which was in effect until March 30, 1945, used the same language with respect to road districts, by especially referring to Section 22 of Article 10 of the old Constitution which included township boards of directors in counties having adopted township organization, as is used in said Section 12, Article 10 of the new Constitution, by saying that: "the qualified voters of any road district, general or special", could vote such additional levy. So we believe that the word "general" means any road district or any number of road districts, that are not formed into special road districts.

Your immediate difficulty, however, lies in the fact that at the present time, no legislation has been passed providing for the manner of calling and holding such an election.

Referring again to the terms of Section 12, Article 10 of the new Constitution which states that: "such election to be called and held in the manner provided by law," it is apparent that that part of said Section 12, respecting the voting of an additional tax of 35¢, in addition to the 35¢ authorized to be levied by the board of directors in counties under township organization, is dependent upon legislation to supplement it in order that it can be carried into effect. No legislation has been passed providing for the manner of calling and holding such an election, and therefore, there would seem to be no way that the additional levy referred to in Section 12 of Article 10, supra, can now be made. If, and when, provision is made by the Legislature for the calling and holding of an election in any road district in counties having adopted township organization for such purpose, said additional levy can be made by the County Court.

CONCLUSION

It is, therefore, the opinion of this Department that:

May 1, 1945

1) The word "general" as used in Section 12, Article 10 of the new Constitution, describing road districts in townships in counties having adopted township organization, means any road district other than special road districts in any township in such county, and,

2) That if the board of directors of a township under township organization has formed only one road district therein the boundaries of the township itself would constitute the boundaries of a road district, and

3) That the County Court of any such county, when authorized by a majority of the qualified voters of any road district within a township in any such county may make an additional levy of not to exceed 35¢ on the \$100 valuation on all property within said road district, which said tax shall be credited to the road district authorizing the levy; but this additional levy could not now be made, because there is no legislation authorizing the calling and holding of a special election for such purposes in any such road district.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney-General

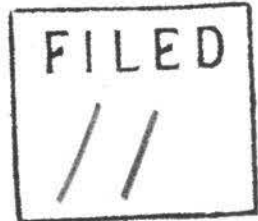
APPROVED:

J. E. TAYLOR
Attorney-General

GWC:lr

TOWNSHIP ORGANIZATION: Special Road Districts incorporated in counties under township organization are not entitled to any portion of the taxes arising from levies and charges.

June 11, 1945



Honorable R. Kip Briney
Prosecuting Attorney
Bloomfield, Missouri

Dear Sir:

Reference is made to your letter dated June 5, 1945, requesting an official opinion of this office, and reading as follows:

"Stoddard County is operating under what is commonly known as the Township Organization Law. One of the townships of Stoddard County is named Richland Township. Within Richland Township there was a short time ago organized a special road district called the 'Essex Special Road District.

"The Commissioners of the Essex Special Road District contend that the special road district is entitled to a part of what is commonly known as the 'Current Fund Revenue' of Richland Township. The part they contend they are entitled to is based upon the percentage of the assessed valuation of the special road district to the total assessed valuation of the township. This revenue is derived under Section 13981 R. S. Mo. 1939.

"My position is, and I have so advised the Commissioners, that they are entitled to no part of this so-called 'Current Fund', as a special road dis-

district has no authority except that vested in the district by Statute, which is solely for road purposes, which the revenue derived under Section 13981 is for other purposes, and is levied and collected as a part of the fifty cent County Revenue Levy for general county revenue purposes by the County Court of Stoddard County.

"The question I desire you to answer is whether or not the Essex Special Road District is entitled to any part of the funds derived under and by virtue of Section 13981, which is the part of the general county revenue, set over to the township board by the County Court of Stoddard County."

We note from your letter of inquiry that the funds referred to therein are those arising under the provisions of Section 13981, R. S. Mo. 1939. Said section reads as follows:

"The moneys necessary to defray the township charges of each township shall be levied on the taxable property in such township, in the manner prescribed in the general revenue law for state and county purposes."

In accordance with your letter of inquiry and the statements contained therein as to the source of the funds, we are disregarding questions which might arise with respect to funds derived from the special road and bridge levies and this opinion will be directed only toward the disposition of the moneys collected to defray township charges.

The nature of such funds and the purposes for which they are raised are set out in the provisions of Section 13980, R. S. Mo. 1939, reading as follows:

"The following shall be deemed township charges: First, the compensation

of township officers for their services rendered in their respective townships; second, contingent expenses necessarily incurred for the use and benefit of the township; third, the moneys authorized to be raised by the township board of directors for any purpose, for the use of the township."

It has been definitely decided that township taxes imposed by virtue of the township organization law are taxes for "county purposes." The following language, appearing in *State ex rel. v. Ry. Co.*, reported 123 Mo. 72, 1. c. 76, so definitely declares:

"Under the township organization act the moneys necessary to defray the township charges of each township are required to be levied of the taxable property in such township in the manner prescribed in the general revenue law for state and county purposes (R. S. 1889, sec. 8478), and to this end the township board of directors is required to make out an account of the amount of money necessary to defray the expenses of the ensuing year, prior to the meeting of the county court at which the assessment for county purposes is to be made; said account signed by the president of the board and attested by the clerk is to be filed with the clerk of the county court on or before the first day of said court, who shall cause the same to be placed upon the tax books of said township, provided that said expenses shall not, together with the amount levied for road purposes and special bridge tax, exceed in any one year twenty cents on the one hundred dollars valuation.' Section 8482.

"Taxes to meet such charges are levied by the county court. Sections 7660 and 7731. The purposes for which they are raised and to which they must be applied

are township expenses, and for roads and bridges. The township expenses being compensation of township officials, and incidental expenses in discharging official functions which in counties not under township organization are discharged by the county officials, and all the charges are such as in counties under normal organization would come under the head of expenditures for county purposes. * * * * *

With this definition of the nature of such funds so declared by the Missouri Supreme Court it becomes pertinent to examine the statutes relating to the incorporation of such road districts in counties under township organization. This necessarily must be done to determine whether or not such special road districts are enjoined with the duty of making disbursements for which such funds might be required. The mode of creation of special road districts in counties under township organization is provided by Article 18, Chapter 46, R. S. Mo. 1939. Upon incorporation such special road district becomes, by the name mentioned in the order of incorporation, a political subdivision of the state for governmental purposes with all the powers mentioned in Article 18, Chapter 46, R. S. Mo. 1939, and such other purposes as may be conferred by law.

The duties of the commissioners of such special road district are set out and defined in a portion of Section 8840, R. S. Mo. 1939, from which we quote:

"* * * Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts, within the district to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, imple-

ments, tools and machinery; all kinds of motor power, and all things needed to carry on such work: * * *

From the above enumeration of the duties imposed upon the commissioners of such special road district, it is apparent that the Legislature conceived that such political subdivision confine itself to the supervision and maintenance of highways, bridges and culverts. Nothing appears in Article 18, Chapter 46, R. S. Mo. 1939, that in any way indicates that the commissioners of such special road districts will require any revenue for the discharge of general township expenses. All of the statutes relating to the raising of funds for the benefit of such special road districts indicate that the money derived therefrom is to be used solely and exclusively for road and bridge purposes.

We call your attention to Section 8841, R. S. Mo. 1939, as amended Laws of 1941, at page 528, wherein provision is made for the creation of funds for the use and benefit of the special road district. We think a portion of such section lends light upon the question you have asked in that it contains a specific directive as to the usage to be made of the funds of the special road district. We quote in part from said section:

"* * * All revenue so set aside and placed to the credit of any such incorporated district shall be used by the commissioners thereof for constructing, repairing and maintaining bridges and culverts within the district, and working, repairing, maintaining and dragging public roads within the district and paying legitimate administrative expenses of the district, and for such other purposes as may be authorized by law."

In addition to the funds provided in said Section 8841, statutory authority exists for the imposition of a special road and bridge tax for the benefit of such special road districts, which is also to be expended solely for road and bridge purposes. See Section 8821, R. S. Mo. 1939.

June 11, 1945

From the above and foregoing we have reached the conclusion that special road districts, incorporated in counties under township organization, do not have duties to discharge which will require them to assume the payment of any township charges. As bearing upon this matter we enclose herewith copies of two opinions previously rendered by this office; one to the Honorable Ray R. Fryer, Prosecuting Attorney, Clinton, Missouri, under date of March 5, 1945, and the other to the Honorable Theo. R. Schneider, Prosecuting Attorney, Butler, Missouri, under date of May 24, 1945. We believe that these opinions, or portions thereof at least, will be of assistance in answering the question you have proposed.

CONCLUSION

In the premises, we are of the opinion that a special road district incorporated in a county under township organization is not entitled to any portion of the township revenue fund arising under the provisions of Section 13981, R. S. Mo. 1939, for the reason that such fund is to be used solely and exclusively to defray township charges.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

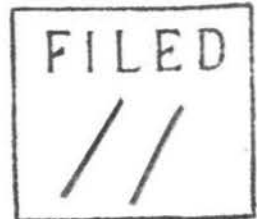
APPROVED:

J. E. TAYLOR
Attorney General

WFB:CP

ELECTIONS: Conviction for felony disqualifies voter until full pardon is granted, except as to persons sentenced to Intermediate Reformatory and disqualified under Section 9120a, Mo. Stat. Ann. (Laws of 1943), or restored to citizenship under Sections 4188, 4210, 4561, 9086 or 9227, R. S. Mo. 1939.

September 6, 1945



Honorable D. W. Breid
Prosecuting Attorney
Union, Missouri

Dear Sir:

We acknowledge receipt of your letter under date of August 16, 1945, requesting an official opinion from this department, which reads as follows:

"John Doe was charged under paragraph 'G', Section 4900, with selling intoxicating liquor without a license.

"Defendant enters a plea of guilty and a fine of \$100.00 and costs was assessed against him.

"Under this conviction, does defendant forfeit his rights to vote at any election?"

Section 2, Article VIII, of the Constitution of Missouri of 1945, provides as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all

elections by the people; provided, no idiot, no insane person and no person while kept in any poor house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting."

We call your attention to that portion of Section 11469, R.S.A. Mo., as amended in 1943, relating to the qualifications of voters, which is as follows:

"* * * nor shall any person convicted of a felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

Section 4900, par. (g), R.S.A. Mo., provides as follows:

"Any person who shall sell in this state any intoxicating liquor without first having procured a license from the supervisor of liquor control, authorizing him to sell such intoxicating liquor shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail, for a term of not less than three months nor more than one year, or by a

fine of not less than one hundred (\$100.00) dollars nor more than one thousand (\$1,000.00) dollars, or by both such fine and imprisonment."

Under the provisions of the above section the conviction for selling intoxicating liquor without a license is made a felony by the laws of the state of Missouri.

Judge Ellison, in his concurring opinion in State v. Sartorius, 175 S. W. (2d) 787, we believe correctly construes Section 2, Art. VIII of the Constitution and Section 11469, R. S. A., as follows:

"I respectfully submit that the proper construction of Section 2, Article 8 of the Constitution and Section 11469 is that the voter to be disqualified must have been convicted of a felony in this state or of a felony in another jurisdiction which would also be a felony if it had been committed in Missouri. * * * * *

It appears then, that upon the conviction of any felony in the state of Missouri the person is disqualified from the privilege of voting until this disqualification is removed.

The disqualifications from the privilege of voting may be removed under the provisions of the following sections:

"Sec. 4188. Pardon.--In all cases in which the governor is authorized by the Constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper."

"Sec. 4210. Final discharge--citizenship restored.--Any person who shall receive his final discharge under the provisions of sections 4199 to 4211, inclusive, shall be restored to all the rights and privileges of citizenship."

"Sec. 4561. Conviction in what cases forfeits citizenship.--Any person who shall be convicted of arson, burglary, robbery or larceny, in any degree, in this article specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this article, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state: Provided, that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years: Provided further, that in all cases where persons have been convicted under this article the disqualification provided may be removed by the pardon of the governor any time after one year from the date of conviction."

"Sec. 9120a. Discharge of inmates from Intermediate Reformatory for Young Men. Any inmate who is now or may hereafter be confined in the Intermediate Reformatory for Young Men, and who shall serve three-fourths of the time for which he may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the reformatory or laws of the same recorded against such inmate, shall be discharged in the same manner as if said inmate had served the full time for which sentenced, and in such case no pardon from the Governor shall be required; civil disabilities incurred by conviction of felony shall cease at the end of two years from such discharge under the three-fourths rule, and such inmate shall thereupon be restored to all the rights of citizenship: Provided, that he shall not have been indicted, informed against by the prosecuting attorney or circuit attorney, or convicted of any other crime during such period, and shall obtain

a certificate to that effect from the Board of Probation and Parole, whose duty it shall be, upon proper showing to issue the same and keep a record thereof."

"Sec. 9086. Three-fourths rule--who eligible, etc.--Any convict who is now or may hereafter be confined in the penitentiary, and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the prison or laws of the same recorded against such convict, shall be discharged in the same manner as if said convict had served the full time for which sentenced, and in such case no pardon from the governor shall be required; and in all cases of first conviction of felony the civil disabilities incurred thereby shall cease at the end of two years from such discharge under the three-fourths rule, and such convict shall thereupon be restored to all the rights of citizenship: Provided, that he or she shall not have been indicted, informed against by the prosecuting or circuit attorney, or convicted of any other crime, during such period, and shall obtain a certificate to that effect from the commission, whose duty it shall be, upon proper showing, to issue the same and keep a record thereof."

"Sec. 9227. Pardon, effect of.--When any person shall be sentenced upon a conviction for any offense, and is thereby, according to the provisions of this article, disqualified to be sworn as a witness or juror in any cause, or to vote at any election, or to hold any office of honor, profit or trust within this state, such disabilities may be removed by a pardon by the governor, and not otherwise, except in the case in the next section mentioned."

Sept. 6, 1945

Referring to Section 9227, supra, the proviso "except in the case in the next section mentioned," should not be considered in construing the above section for the reason that the "next section" referred to in the above section was Section 12971, R. S. Mo. 1929, and was repealed by Laws of 1939, page 279.

In the above quoted sections, providing for the restoration of citizenship and the subsequent removal of the disqualifications to vote, Section 9086 appears to be in conflict with the provisions of Section 9227. However, Section 9227 is taken from R. S. 1835, p. 214, and Section 9086 was taken from the Laws of 1917, p. 155. It is a general rule of statutory construction that where an irreconcilable conflict exists between the provisions of one statute with another, the last will stand and the other, which cannot stand with it, is of no effect. *City of Westport v. Jackson*, 69 Mo. App. 148.

It has been held that the pardoning power belongs exclusively to the executive department of the government, and can not be exercised by the legislative department. *State v. Sloss*, 25 Mo. 291; *State v. Todd*, 26 Mo. 175. However, under the provisions of Section 2, Art. VIII of the Constitution of Missouri of 1945, supra, we find that the legislature may exclude persons convicted of felony, or a crime connected with the right of suffrage from the privilege of voting, and, certainly, if the legislature possesses the discretionary power of enacting legislation taking away the privilege of voting, it may enact legislation to restore this privilege that it has previously taken away.

CONCLUSION

Therefore, it is the opinion of this department that (1) a person is disqualified as a voter in the state of Missouri when he has been convicted of a felony in this state, or of a felony in another jurisdiction which would also be a felony if committed in Missouri, and has not been pardoned for such offense; (2) however, a pardon would not be required of persons whose citizenship has been restored under the provisions of Sections 4210, 4561, 9086, R. S. Mo. 1939, and 9120a R.S.A., Laws of 1943.

Respectfully submitted,

APPROVED:

A. V. OWSLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

AVO:CP

CRIMINAL COSTS: Fee bills filed with the County Court to be
adjudicated upon are subject to the Statutes of
Limitations; Defense of limitations may be
waived by county.

2
Smith
26
10-2
FILED
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September 26, 1945

Hon. Lynn Bradford
Prosecuting Attorney
Rolla, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"There is a matter pending before the County Court of
Phelps County concerning which I should very much
appreciate having your official opinion.

Fred C. King of Rolla, Missouri held the office of
Sheriff of Phelps County from January 1937 until
January 1, 1941. During his tenure of office there were
a number of fee bills approved by the then Prosecuting
Attorney of this County and the Circuit Judge which were
filed in the office of the County Clerk for allowance
and payment by the County Court. No action of record
or otherwise was taken by such County Court or any of the
county courts in office later with regard to the allow-
ance or refusal to allow these bills for payment. They
simply remained on file in the County Clerk's office
and pending without any action or decision of the County
Court. Mr. King is now requesting the present County
Court to allow and pay these bills and there is a
question as to the statute of limitations as some of
the bills are more than 5 years old.

The question is whether the filing of these bills
with the County Clerk has the effect of tolling the statutes
of limitation and if the County Court could legally pay
these bills."

Your request submits two questions. The first is whether
the filing of a criminal cost fee bill, duly certified, with
the County Court tolls the statute of limitations, and the
second question is whether the County Court can legally pay
the fee bills mentioned in your letter. We shall discuss these
questions in order.

Section 1012 R.S. Mo. 1939 reads in part as follows:

"Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued: * * * * *

Section 1014 R.S. Mo. 1939 reads in part as follows:

"Within five years: * * * * * Second, an action upon a liability created by a statute other than a penalty or forfeiture; * * * * *

From the above sections it is evident that for the Sheriff to avoid the limitations set forth in Sections 1014, supra, he must commence or must have commenced an action for the recovery of his fees within five years from the time a cause of action thereon accrued to him. In order to determine whether the sheriff can recover for the fees mentioned in your letter it is necessary to determine when a cause of action accrued to him for those fees and whether the filing of the fee bills with the County Court amounted to the commencement of an action to recover such fees.

A cause of action accrues to a party whenever that party has the right to commence a suit to enforce his claim. In *Crawford v. Metropolitan Life Insurance Company* 167 S. W. 2, 915, 922, the Court said:

"But there is ample authority in our State to the effect that the statute of limitations does not begin to run until a time is reached when the creditor has a right to enforce payment of the debt by suit. *State ex rel. Fehrenbach v. Logan*, 195 Mo. App. 171, 190 S.W. 75; *Lewis v. Thompson*, 231 Mo. App. 321, 96 S.W. 2d 938. And the length of time between incurring a liability and the right to sue thereon is unimportant."

Likewise, in the *State Ex. Rel. vs. Schulte*, 90 S.W. 2, 1078, 1083, the Court said:

"A cause of action does not accrue so as to set in operation the running of the statute of limitations until the injured party has the right to sue thereon." (citing numerous authorities.)

We must, therefore, determine when the sheriff first had the right to commence a suit to recover the fees shown in the fee bills under consideration. Fee bills for criminal costs are provided for by Section 4236, 4237 and 4240, R.S. Mo. 1939. Said sections read as follows:

Section 4236:

"The Clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Section 4237:

"It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

Section 4240:

"Each and every bill of costs presented to any county court for allowance shall be examined and certified to by the judge and prosecuting attorney in the same manner, all necessary charges excepted, as provided for certifying bills of costs to the state auditor for payment; and any county judge who shall pay, or vote to pay, any cost incurred in any criminal case or proceeding, unless the same is so certified to, shall be adjudged guilty of a misdemeanor."

Since Section 4240, supra, makes it unlawful for the county court to pay any criminal cost fee bill unless the same has been certified to by the Judge and prosecuting attorney, it follows that the claimant of such fees could not maintain an action for same until the fee bill had been so certified. Such claimant would, therefore, not have a cause of action (the right to sue) for his fees in such cases until the fee bill had been made out and certified to according to law, and, therefore, statutes of

limitations would not start running against said fees until such certifications had been made. Under Section 1014, supra, therefore, the sheriff you mentioned would have five years from the date of the certification and delivery to the Circuit Clerk of the fee bills within which to commence an action for his fees.

Your letter states that the fee bills (duly certified) were filed with the county court but that no action was taken thereon by the county court. The question arises as to whether the filing of such fee bills amounted to the commencement of an action by the sheriff.

Section 13824, R.S. Mo. 1939 provides in part as follows:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts;
* * * * "

Section 2496 R.S. Mo. 1939 reads as follows:

"If any account shall be presented against a county, and the same, or any part thereof, shall be rejected by the county court, the party aggrieved thereby may prosecute an appeal to the circuit court in the same manner as in other cases of appeal from the county to the circuit court; and the circuit court shall proceed to hear, try and determine the case anew, without regarding any error, defect or other imperfections in the proceedings of the county court."

At first blush it would seem that since a right of appeal is given to a party aggrieved by the action of a county court on an account filed with it, such a procedure is in fact a suit or action against the county. However, the courts have considered this question many times and have ruled that the filing of an account against the county with the county court for allowance is not the commencement of an action against the county. The case of *K. C. Sanitary Co v. LaClede County*, 307 Mo. 10, 269 S.W. 395, was a case where a company had sued the county in the circuit court upon an account. One of the defenses asserted by the county was that the circuit court did not have jurisdiction to hear the action because the exclusive original jurisdiction to hear and determine such a claim was in the county court. In discussing said defense the Court said, 269 S.W. 1.c. 397:

"Subdivision 2 of section 2436 provides for exclusive original jurisdiction of the circuit court in all civil cases which shall not be cognizable before county courts, probate courts, and justices of the peace and not otherwise provided for by law. Defendant apparently contends that section 2589 has made such provision otherwise. The function of the county court is merely to audit and settle claims and demands against the county. Section 2574. A claim against a county is not technically a suit at all. Gammon v. Lafayette County, supra. If a claim is presented to the county court and allowed, well and good. If it is rejected, the claimant may appeal to the circuit court. There is no language in section 2589 which may fairly be construed as constituting rejection of a demand against a county by the county court a final adjudication of demandant's right to recover against the county.

It is true that one having a demand against a county may present his demand to the county court, and, if it is rejected, he may prosecute an appeal to the circuit court. But such procedure is not exclusive. He may file his suit in the circuit court, regardless of the amount of his demand (section 9506), and proceed therein to trial and judgment, if he so elects, regardless of whether or not the county court has rejected such claim. Filing a claim against a county in the county court is not filing an action at all in the legal sense. If it were, then section 9506 entirely deprives the county court of the right to pass upon such claim, which clearly was not intended."

In Jackson County v. Payman 44 S.W.(2) 849 (Mo. Sup.) the court again discussed the nature of a proceeding before the county court on a claim against the County. In that case the court said, l.c. 852:

"The power and authority of county courts and the capacity in which such body acts in auditing and paying claims against the county has been before this court for decision many times. We think that it is now well settled that county courts do not act judicially in allowing, adjusting, or refusing claims presented against the county, or necessarily arising from managing its financial affairs. While such body does not act in a purely ministerial capacity in such matters, in the sense that they act without investigation and have no discretion in the matter, yet they do not try the merits of the claim as a court, but rather act as auditing financial agents of the county whose action is not final in the sense that a judgment of the court is final except on appeal or by other appropriate remedy."

September 26, 1945

In the latter case the court quoted with approval from the case of *Sears v. Stone County* 105 Mo. 236, the following, l.c. 853:

"In auditing accounts, there is no part of the proceeding which takes the form of a judicial proceeding. 'No petition is filed, no parties are summoned to answer the demand and no issues are triable by a jury, except in the discretion of the court.' *Gannon v. Lafayette County*, supra. It is true, in a certain sense, they act judicially when they decide upon claims against the counties, but not more so than the auditor or financial agent of a corporation or firm when he passes upon an account presented. It is true, also, that the right of appeal is given in case the account presented against the county, or any part thereof, be rejected. This appeal is specially provided, and would be altogether unnecessary if the rejection of an account constituted a judgment. * * * The statute allowing appeals from their action in rejecting accounts could only have been intended to provide a convenient and inexpensive method for having a judicial determination of a matter about which the parties are unable to agree. That could hardly be called a judicial proceeding in which the agent of one party sits in judgment upon the rights of the others."

From the above, we think it is clear that the filing of a claim against a county with the county court for allowance does not amount to the commencement of a "civil action" against the county as those words are used in Section 1012 of the statutes, supra, and hence the filing of the fee bills mentioned in your letter did not toll the running of the statute of limitations.

Your next question is whether the county court can now lawfully pay the fee bills mentioned in your letter. Your letter indicates that some of the fee bills are not more than five years old. Of course, fee bills which have been certified to less than five years ago could be paid by the county court if the budget of the county permitted such payment. We presume your last question is directed primarily to those bills certified more than five years ago.

The defense of statutes of limitations are affirmative defenses and must be specially pleaded and raised in order to be available to a party. In *Murray v. De Luxe etc.* 133 S.W. (2) 1074, 1076, (Mo. App.) the Court said:

"In the case before us defendant was content to file as its answer a general denial, under which the benefit of any statute of limitations was not available, for a plea of the statute of limitations in defense is an affirmative one and must be pleaded."

September 26, 1945

In *Kopp v. Moffet*, 167 S.W. (2) 87, 91 (Mo. App.) the Court, in discussing statutes of limitations said:

"This is an affirmative defense and must be pleaded in order for defendant to rely thereon."

It has also been held that statutes of limitations do not extinguish a debt but only bar the remedy. In *Sturdy v. Smith*, 152 S.W. 2 1036, 1037 (Mo. App.) the Court said:

"Defendants' contention that plaintiff's rights are barred by the special statutes of limitations pleaded by them, because of his failure to file his claim in the probate court against the estate of Louise Smith during the one year period provided by such statutes, cannot be sustained. A debt is not extinguished by the bar of such statute of limitations. By pleading the bar of such statute, the person owing the debt merely avoids a personal judgment if such plea is sustained."

Likewise, in *Hickey v. Sigillito*, 162 S.W. (2) 639, 641, (Mo. App.) the Court said: "The statute of limitations does not extinguish a debt. It does not affect the right, but affects the remedy only. The bar of the statute may be waived."

It will be seen, therefore, that the mere fact that the sheriff has not commenced an action against the county for his fees within five years after he first had the right to bring such an action does not extinguish his claim. Whether the county wants to avail itself of the defense of the statute of limitations is a question of policy for the county court to determine. If the sheriff should bring an action against the county for his fees and the county did not specially plead the five year statute of limitations, the sheriff could recover, unless there is some other defense to his claims which are not mentioned in your letter.

CONCLUSION

It is, therefore, the opinion of this office (1) that the filing of criminal cost fee bills with the county court of a county does not amount to the commencement of an action against the county thereon and does not toll statutes of limitations and (2) that the county court can pay criminal cost fee bills which have been certified according to law more than five years ago if and when proper funds are available for that purpose under the county budget.

Yours very truly,

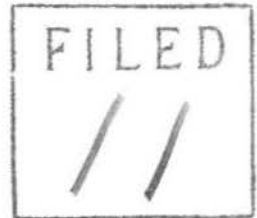
HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CRIMINAL LAW: State has right to appeal only when information or indictment is adjudged insufficient, or where judgment thereon has been arrested or set aside because of the insufficiency of the indictment or information.

November 15, 1945



12/17

Honorable Llyn Bradford
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based on the following statement of facts:

"We tried the above-mentioned case in the Circuit Court of Laclede County for four days last week, and the Jury found the defendant guilty, and assessed his punishment at 25 years in the State Penitentiary. The charge was murder in the first degree, by saturating the clothing of the brother-in-law of the defendant with kerosene and setting him on fire, resulting in his death the same day, March 31, 1945, the charge further invoking the habitual criminal act, and setting out seven previous penitentiary terms served by the defendant. Claude Woods of Richland, and Bradshaw and Fields of Lebanon, represented the defendant. After the verdict was returned, Judge Barton, before whom the case was tried, allowed the defendant thirty days to file a motion for a new trial. In connection with extending the date for filing the motion for a new trial, the Judge made certain comments about the sufficiency of the circumstantial evidence, which indicated that he might sustain the motion and grant the defendant a new trial, for error in not having sustained the demurrer to the evidence.

"This is a case that has attracted much attention, and the people of Rella and Phelps County, generally, are very much interested in seeing Wagoner go back to the penitentiary where he belongs. While it is true the evidence was circumstantial, yet there was a lot of it, including definite threats made by the defendant as recent as an hour before the fire. I am definitely sure in my own mind that the conviction would stand up, so far as the sufficiency of the evidence to make a prima facie case is concerned.

"The thing I am interested in is the possibility of an appeal prosecuted by the State, from the ruling of the Court sustaining the motion for a new trial, in the event that the Court does grant a new trial. I presume the State would have to pay for the cost of the bill of exceptions, if we take the appeal. I used some fifty-four witnesses, and the trial having lasted four days, the costs of such an appeal would naturally be considerable. There is a tremendous local interest in the case, especially due to the fact that the evidence showed the defendant, an habitual criminal, has threatened to kill several witnesses who testified against him at the hearing and the trial of the case. If the motion for new trial is granted and no appeal is taken, I greatly fear that I will have the greatest of difficulty assuring these witnesses that they can safely go ahead and again testify against the defendant, as they are all very much afraid of him. I do not know what the final ruling of Judge Barton will be on the motion for a new trial, as it will not be argued until I have had a reasonable chance to make necessary preparation to meet the issues raised in the motion, but I would like to know that your office would sanction an appeal, in case a new trial is granted on any ground, other than purely the weight

of the evidence."

In the case of State v. Carson, 18 S.W. (2d) 457, l.c. 459, 323 Mo. 46, the Supreme Court of Missouri said:

"There was no appeal at common law.
The only authority for an appeal by the
state must be found in the statute. * * *"

Your attention is called to the following sections of the Revised Statutes of Missouri 1959, which are the only ones dealing with an appeal by the State:

Section 4142.

"The state, in any criminal prosecution, shall be allowed an appeal only in the cases and under the circumstances mentioned in the next succeeding section."

Section 4143.

"When any indictment or information is adjudged insufficient upon demurrer or exception, or where judgment thereon is arrested or set aside, the court in which the proceedings were had, either from its own knowledge or from information given by the prosecuting attorney that there is reasonable ground to believe that the defendant can be convicted of an offense, if properly charged, may cause the defendant to be committed or recognized to answer a new indictment or information, or if the prosecuting attorney prays an appeal to an appellate court, the court may, in its discretion, grant an appeal."

Section 4145.

"If no appeal be taken by or allowed to the state in any case in which an appeal would lie on behalf of the state,

the prosecuting attorney may apply for and prosecute a writ of error in the Supreme Court, in like manner and with like effect as such writ may be prosecuted by the defendant; but in such case the defendant shall not be required to enter into any recognizance to answer further to such offense, but if the judgment of the circuit court shall be reversed, the defendant may be arrested on warrant and brought before the circuit court for judgment, or such other proceedings as the case may require."

The court in the Carson case, supra, discussed the subject of appeal by the State at length and definitely defined the State's rights and grounds in the prosecution of an appeal, and in construing the above sections of the statutes said, l.c. 459:

"It is plain from these statutes that the state may appeal from an order arresting a judgment or holding an information or indictment insufficient on demurrer or exception.
* * * *

In the case of State v. Reisman, 37 S.W. (2d) 675, the State attempted to appeal from an adverse ruling by the trial court on a demurrer filed to a plea in abatement, and the court, in construing the statutes, said at l.c. 677:

"* * * * If there is any authority for such an appeal, it must be derived from a strict construction of the section of the statute allowing appeals. State v. Clipper, 142 Mo. 474, 476, 44 S.W. 264. Reverting to that section, we find that the appeal is permitted only 'when any indictment or information is adjudged insufficient upon demurrer or exception, or where judgment thereon is arrested or set aside.' In the instant case it is patent that the information was not adjudged insufficient upon demurrer or exception. No judgment thereon was arrested or set aside. No one of the three things occurred which would give rise to the expressed right of appeal. * * * *

In the case of State v. Putrell, 46 S.W. (2d) 588, l.c. 589, the court, in following the authority of the Carson case, supra, said:

"The right of the state to an appeal in this case should be upheld upon the authority of State v. Carson, 323 Mo. 46, 18 S.W. (2d) 457. It is true that the order of the trial court sustaining the motion for a new trial appears to state two grounds for the order. But the second ground is the supplement of the first, and the two together make but one cause for a new trial. The stated reason for the order was that the information did not state facts sufficient to constitute the felony of abortion, as it did not allege the nature or kind of instrument used, how used, or on what part of the body. 'For the foregoing reasons' runs the order, 'and for the reason the court permitted the state to prove the kind of instrument and how and where used over the objections of defendant, the motion for a new trial is sustained.' It is obvious that, to the mind of the trial court, the objectionable testimony would have been admissible if the information had been held to be sufficient. In the Carson Case, supra, the trial court, in sustaining the motion for a new trial, gave in like manner one principal reason and two corollaries, which together made but one cause for the order, namely the insufficiency of the information. We hold that the state was entitled to an appeal in this case."

A ruling by the trial court that a motion for a new trial should be sustained because the evidence was not sufficient is not appealable by the State. In the case of State v. Early, 49 S.W. (2d) 1060, l.c. 1061, the court said:

"We have examined the record in connection with the other assignment (No. 5) in the motion for a new trial and find that, while there was a motion to quash the indictment filed by the defendant, this was withdrawn

prior to the trial. No demurrer was filed to the indictment or overruled by the court. We do find that at the conclusion of the trial that the court sustained a demurrer to the evidence. It is apparent that the state has no right of appeal in this case (sections 3752 and 3753, R.S. 1929) and the appeal is dismissed."

Section 4145, supra, deals with the State's right to sue out a writ of error, which right is only granted in a case in which an appeal would lie on behalf of the State. The court, in discussing this subject, said in the case of State v. Beagles, 174 Mo. 624, 1.c. 626, 74 S.W. 851:

"The question which forces itself upon our attention at the outset, is the right of the State to prosecute a writ of error upon the facts disclosed. Section 2709, Revised Statutes 1899, provides that, 'When any indictment is quashed, or adjudged insufficient upon demurrer, or when judgment thereon is arrested, the court in which the proceedings were had, either from its own knowledge or from information given by the prosecuting attorney, that there is a reasonable ground to believe that the defendant can be convicted of an offense if properly charged, may cause the defendant to be committed or recognized to answer a new indictment; or if the prosecuting attorney prays an appeal to the Supreme Court, the court may, in its discretion, grant an appeal.' The State is allowed an appeal only in the cases and under the circumstances mentioned in the foregoing section.

"By section 2711, Revised Statutes 1899, 'if no appeal be taken by or allowed to the State in any case in which an appeal would lie on behalf of the State, the prosecuting attorney may apply for and prosecute a writ of error

in the Supreme Court, in like manner and with like effect as such writ may be prosecuted by the defendant,' etc. This last mentioned section was evidently intended to grant the State the right to bring up a criminal case by writ of error, a right which this court held had not been granted in the condition of the law up to the time of the decisions in State v. Copeland, 65 Mo. 497, and State v. Cox, 67 Mo. 46.

"Writs of error are only allowed, however, by section 2711, supra, in cases in which an appeal would lie."

Your request for this opinion deals mainly with the subject of sufficiency of the evidence, but I notice in paragraph three you state, "but I would like to know that your office would sanction an appeal, in case a new trial is granted on any ground, other than purely the weight of the evidence." I call this particular part of your request to your attention because an appeal might lie if the court, in ruling on a motion for a new trial in which the question of the sufficiency of the information is raised, granted the defendant a new trial on that ground alone. Otherwise, the State would not have the right to prosecute an appeal.

Conclusion.

It is the opinion of this department that the State can only appeal in a criminal case where an indictment or information is adjudged insufficient upon demurrer or exception, or where judgment thereon is arrested or set aside because of the insufficiency of the indictment or information.

Respectfully submitted,

APPROVED:

W. BRADY DUNCAN
Assistant Attorney General

W. O. JACKSON
(Acting) Attorney General

WBD:ml

ELECTIONS:

COUNTY COURTS:

COURTHOUSE AND JAIL BONDS:

Time of calling of special
election, upon proper presentation
of petition, vested in the County
Court.

December 29, 1945

FILED

Honorable Llyn Bradford
Prosecuting Attorney
Phelps County
Rolla, Missouri

Dear Sir:

Your letter of November 26th, 1945, requesting an
opinion from this department, reads as follows:

"Recently, a group of citizens of Phelps County, taxpayers, and in all other respects qualified under the statute as petitioners, submitted a petition to the County Court, asking for a special election to be held in this County, for the purpose of letting the people vote on a proposed bonded indebtedness in the sum of \$400,000, for the construction of a new Court House and County Jail. The statute requires such petition to be signed by at least 100 taxpaying citizens of this County, and there were nearly 400 that signed this petition. The petition specifically asked the County Court to order a special election, but notwithstanding that fact, the County Court made an order for such election to be held at the next Primary Election date in August, 1946. * * * One member of the County Court, together with a number of the petitioners, have requested that I obtain from you an opinion as to the validity of the order of County Court in delaying the election until the next Primary. * * * I would appreciate your views on this question. * * * * *

The applicable part of Section 3292, R. S. Mo. 1939, dealing with the calling of special elections to determine whether an indebtedness for the construction of a courthouse and jail, appears as follows:

"Whenever it may become necessary for any county in this state to incur an indebtedness in excess of the income and revenue provided for in one year, for the purpose of building a court house or jail, or for the purpose of repairing or rebuilding a court house or jail partially destroyed by fire, earthquake, storm or in any other manner, or to establish in any city or village in any county a public county hospital wherein persons other than the indigent infirm may be treated, it shall be lawful for any number not less than one hundred of the qualified voters of such county who are taxpayers therein to present to the county court of such county a petition in writing setting forth the object and purpose for which the indebtedness is desired to be incurred, and whether it is desired to issue bonds in evidence of such indebtedness, or to pay the same in a given number of years, to be stated in the petition, by the direct levy of taxes at a rate over and above the amount limited in section 11 of article 10 of the Constitution of the state of Missouri, and asking that an election be held to authorize the incurring of such indebtedness or the levying of such taxes. Upon the presentation of such petition it shall be the duty of the county court of such county at any term thereof to order that an election be held for the purpose set forth in the petition, which order shall, among other things, specify the time, place and purpose of the election. Such an election may be a special election,

or it may be held on the day of any
primary or general election author-
ized to be held by the laws of this
state: * * * * *

(Emphasis ours.)

Historically, provisions similar to the above section, 3292, originated in the Laws of Missouri 1879, pages 193 and 194, pars. 2 and 3, later appearing in Sections 852 and 853, R. S. Mo. 1889.

Section 852, R. S. Mo. 1889, provided in part as follows:

"* * * Upon the presentation of such petition it shall be the duty of the county court of such county, at a regular term thereof, to order a special election for the purpose set forth in the petition. * * * * *

Section 853, R. S. Mo. 1889, in part contained this proviso:

"Provided, that such election may be held at the same time of holding the general election for state and county officers. * * * * *

The above quoted parts of Sections 852 and 853, R. S. Mo. 1889, continued in our Missouri laws until their revision in the Laws of Missouri 1919, page 172, and Laws of Missouri 1921, page 162, wherein the provisions as set forth in Sections 852 and 853, supra, were combined as they appear today in Section 3292, R. S. Mo. 1939, and the same provision as contained in Section 3292, supra, provides that:

"* * * Upon the presentation of such petition it shall be the duty of the county court of such county at any term thereof to order that an election

be held for the purpose set forth in the petition, which order shall, among other things, specify the time, place and purpose of the election. Such an election may be a special election, or it may be held on the day of any primary or general election authorized to be held by the laws of this state: * * * * *

In the case of State ex rel. Witmer, et al. v. Conrad, et al., 147 Mo. 654, 1. c. 660, the Supreme Court of Missouri, in a mandamus action to compel the county court to call a special election on the proposition to incur an indebtedness to build a jail, in construing the duty of a county court to call such special election, held as follows:

"Though it is true as asserted in appellants' first contention, that the time for calling an election as provided for under section 852, supra, is vested in the county court, it by no means follows that because the petitioners designate a time within which they desire an election to be held as prayed for in their petition filed with the county court (for such election), the county court could make that an excuse for failing to order an election that otherwise should have been ordered.

"That request or suggestion in relators' petition neither served to divest the county court of its authority to fix the time when the election should be held, nor did it furnish a legal justification for the court's action in absolutely refusing to call an election, made imperative by said action when the requisite number of qualified voters and taxpayers petition for same. It is not the suggestion of the petition without the range of the statute, but the request and prayer thereof within the compass of the law, upon which the court must make its final order.

"The petition could not have been so framed as to have taken from the county court their discretion as to when the election should be held, nor to have relieved the court from the duty of ordering an election, if the petition stated the requisite jurisdictional facts, and was signed by the requisite number of petitioners.

"Nor does the right in the judges of the county court to fix and name the time for the calling of an election under section 852, supra, imply the right to refuse arbitrarily to fix or name any date whatever, and thus by refusal defeat an election, that should have been called.

"That discretion is purely ministerial, and when the jurisdictional facts in the petition have been set out and made to appear, and upon which the court has exercised its judicial functions, it can not withhold the exercise of a ministerial discretion to defeat its judicial finding."

In the above case the Section 852 referred to is Section 852 of the Revised Statutes of 1889, which we have quoted above in the body of this opinion, and it was plainly held that the discretion as to when the election should be held is vested in the county court. The court further held that the section did not imply the right of the court to refuse arbitrarily to fix or name any date whatever, and thus by refusal to defeat the purpose of the section.

However, it must be realized that the Legislature has purposely given this discretion to the county courts and the reason for the discretion may have been based upon the fact that, during certain seasons of the year, especially in rural sections, weather conditions, or other conditions that the court may recognize, might prevent a large number of the qualified voters from participating in the special election. Also, the county's financial condition, of which

the county court necessarily has superior knowledge, might make it advisable to hold the special bond election at the same time as a primary or general election in order that the court may keep the costs of elections within the amounts set out in their budget.

CONCLUSION

Therefore, it is the opinion of this department that the County Court is acting within its powers when, upon proper presentation of a petition, to call a special election to vote upon a proposed bonded indebtedness for the construction of a new courthouse and county jail, it orders such election to be held at the next primary election date.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

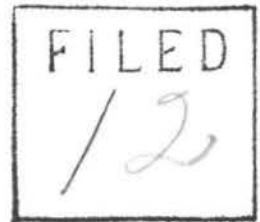
APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

SCHOOLS: Three questions regarding extension of city or town school district by extension of city or town limits.

March 2, 1945



Mr. Joseph N. Brown
Prosecuting Attorney
Springfield, Missouri

Dear Sir:

We have your letter of recent date, in which you submit the following for our opinion:

"Can a rural school district form a consolidated district within itself, or is it necessary that a consolidated district be formed from more than one district? The district in question is Oak Grove district #90 which adjoins the Springfield City limits.

"The Oak Grove district has a valuation \$961,000 and contains almost eight square miles of territory. Its present enrollment is 242 students. Another question is: If a consolidated district is organized, could the City of Springfield extend its boundary to take in any part of the district so formed? And if the City did extend its boundary so as to take in part of the consolidated district, would the City have to assume any part of the bonded indebtedness?"

Three questions are presented by your request. The first one is whether a common school district can be organized into a consolidated school district. The second question is whether or not, if a city extends its limits so as to include a part of a consolidated district adjoining said

city, the city school district is automatically extended to include such portion of the consolidated district. The third question is, if the city school district is extended in the manner last indicated, does the city school district become liable for any of the bonded indebtedness of the consolidated district.

At first blush, one would think that for a district to be a "consolidated district," it would have to be one which is made up or composed of other districts, or parts of districts, since the word "consolidated" is often used to mean "merged" or "united." However, the word "consolidated" also means "made solid or compact--solidified" (Webster's New International Dictionary). Furthermore, "consolidated school districts" are defined by Section 10323, R. S. Mo. 1939, as follows: "All districts outside of incorporated cities, towns and villages, which are governed by six directors."

There is nothing, therefore, in the meaning of the word "consolidated," as that word is used in ordinary language, or as it is used in the statutes relating to school districts, which would limit the term "consolidated district" to a district made up or composed of other districts, or parts of districts. Under the school laws, a consolidated district is simply a district outside of an incorporated city, town or village, which is governed by six directors.

We now turn to the Statutes to see how such a district can be formed. If Oak Grove common school district can be organized into a consolidated district, it is by virtue of Section 10493, R. S. Mo. 1939, since other statutes providing for consolidated districts manifestly do not apply to the situation you present by your inquiry. Said Section 10493 reads as follows:

"The qualified voters of any community in Missouri may organize a consolidated school district for the purpose of maintaining both elementary schools and high school as hereafter provided. When such new district is formed it shall be known as consolidated district No. _____ of

county, and all the laws applicable to the organization and government of town and city school districts as provided in article 5, chapter 72, R. S. 1939, shall be applicable to districts organized under the provisions of sections 10493 to 10500, inclusive."

It will be noted that by said section the qualified voters of "any community" may organize a consolidated district. In the case of *State ex inf. v. Scott*, 304 Mo. 664, 264 S. W. 369, the Supreme Court quoted with approval the following definition of the word "community," as used in the foregoing statute:

"The word community in this act is not employed in any technical or strictly legal sense, but is a sort of synonym of "neighborhood" or "vicinity" (*Berkson v. Railroad*, 144 Mo. loc. cit. 220, 221, 45 S. W. 1119), or may be said to mean the people who reside in a locality in more or less proximity (*Keech v. Joplin*, 157 Cal. loc. cit. 11, 106 Pac. 222. So defined, a community may include several districts and parts of districts. There is no requirement that the petitioners shall reside here or there in the community. That they are resident citizens of it is enough."

The people of a common school district clearly live in the same neighborhood, or vicinity, or locality in more or less proximity, and, therefore, constitute a community. In view of the language of Section 10493, supra, and of the definition of the word "community" by the Supreme Court, we think that a common school district can be organized into a consolidated district, provided it meets other requirements of the statutes.

Section 10494 requires the proposed consolidated district to contain an area of fifty square miles or have an enumeration of at least two hundred children of school age.

The Supreme Court has construed Section 10494 to mean that if the proposed district either has at least two hundred children of school age or has fifty square miles of territory, it meets the requirements of this section, and that such proposed district does not have to have both the required number of children and the required territory. (State ex inf. v. Lamar, 316 Mo. 720, 291 S. W. 457; State ex inf. v. Meeker, 317 Mo. 719, 296 S. W. 411.) Oak Grove district has more than two hundred children of school age and hence meets the requirements of Section 10494. We understand that it is proposed to incorporate the whole district into a consolidated district. If only a part of such district is incorporated, then Section 10497 would have to be taken into account.

Our conclusion is that a common school district which has an enumeration of at least two hundred children of school age, or has fifty square miles of territory, can be organized into a consolidated school district.

Turning to your second question, we find that Section 10466, R. S. Mo. 1939, provides, in part, as follows:

" * * * and every extension that has heretofore been made, or that hereafter may be made, of the limits of any city, town or village that is now or may be hereafter organized under the laws of this state, shall have the effect to extend the limits of such town or city school district to the same extent, and such extension of the limits of any city or town school district shall take effect on the first day of July next following the extension of the limits of such city, town or village: * * * "

By the foregoing statute, the extension of the city limits automatically extends the limits of the city or town school district correspondingly. (Section 10486 implies such automatic extension.) No exception is made as to the type of district outside such city which might be affected, and, therefore, if the extension of the city limits reached into a consolidated district, such part of that district as was

included in the extension would automatically become a part of the city school district as of July 1st next following such extension.

With the question of whether the city district would become liable for the bonded indebtedness, or any part thereof, of the consolidated district of which it had absorbed a part, we have had some difficulty. If the city limits were extended to include the whole consolidated district, the answer would be easy. In *State ex rel. v. Smith*, 121 S. W. (2d) 160, 162, the Supreme Court said:

"It has also been held to be the general rule in this state that in the absence of constitutional or statutory provisions to the contrary where one corporation goes entirely out of existence by being annexed to or merged in another corporation, then the subsisting corporation will be entitled to all the property and will be answerable for all the liabilities. When the benefits are taken, then the burdens are assumed. This general rule was applied to school districts in the case of *Thompson v. Abbott*, 61 Mo. 176, which case was cited with approval in *Mt. Pleasant v. Beckwith*, 100 U.S. 514, 25 L.Ed. 699, where it is stated that as extinguished municipal corporations have no power to levy taxes to pay debts, the town to which the territory and property of the annuled municipality was annexed should become liable for its outstanding indebtedness. * * * "

However, in the case you submit, it is clear that it is not contemplated that the whole Oak Grove consolidated district (when incorporated) will be included in the extension of the city limits of Springfield, but that only a part of such Oak Grove district will be absorbed by the city district. It may well be that the Oak Grove consolidated district will be left as a district, but with a part of its territory gone. Therefore, we do not think the rule announced in *State ex rel. v. Smith*, *supra*, would apply.

Likewise, the Act found at page 545, Laws of 1941, would not cover the situation you submit, because that Act authorizes the consolidation of a city district and a consolidated district, thereby resulting in a new consolidated district of the two. The case you submit is not the formation of a new consolidated district out of the Springfield city district and the Oak Grove district, and hence that statute does not help in the solution of your question.

So, also, Section 10498, R. S. Mo. 1939, provides that when a consolidated district is organized, the bonded indebtedness of the component districts shall become the obligation of the consolidated district. This section would not apply to the situation you present, since there would be no consolidated district created by the extension of the city limits of Springfield, but the district which would result thereby would still be the district of the city of Springfield.

It is a settled principle of law that the Legislature can control the disposition of and liability for indebtedness of municipal corporations upon their dissolution, merger, division, etc. (43 C. J., p. 143, Sec. 123; State ex rel. v. Smith, supra.) As pointed out above, the Legislature has made provision for many situations, but for the situation you present the Legislature has made no such provision that we are able to find.

The case of Hughes v. School District, 72 Mo. 643, presented the converse of the situation presented by your inquiry. In that case a district which had become liable for an indebtedness was broken up by operation of law into other school districts. The court held that the other school districts were each liable for the whole debt of the former district. In discussing that situation, the court said:

" * * * So, also, where in consequence of the operation of law, a county is divided, and, as the result of such division, an ordinary township is bisected by the new county line, neither section of the township stands absolved from its debts, nor from the legal effect of a judgment previ-

ously rendered against the whole township, each section remaining liable for the whole debt, but possessing the right of contribution in case of payment. And so it was ruled in Plunkett's Creek Township v. Crawford, 27 Pa. St. 107. The same principle which dominates in the class of cases just mentioned should dominate in this one, and as no provision was made by law for the liabilities already incurred by township 64, prior to its dissolution, it must needs follow that each fractional portion of the defunct township, represented by the various school districts into which that township has been divided, stands liable in solido for the whole debt, but when such fractional portion or school district settles the debt, recourse over against the other fractional portions will be allowed it for whatever amount it may have paid above its own proper amount of the debt."

As we interpret the above decision, the court held that where a municipal corporation is subdivided into other municipal corporations, each of the other corporations becomes liable for all of the indebtedness of the current corporation. This is not exactly the situation you present either, because, in your situation, only a portion of one municipal corporation is taken away from it and added to another corporation. The portion taken away from one district, in the situation you present, does not become a municipal corporation in and of itself, and hence the rule announced in the Hughes case, *supra*, would not apply.

In the case of School District v. School District, 340 Mo. 793, 102 S. W. (2d) 909, the Supreme Court was considering a case where there was a dispute as to the title to land which had been in one district and thereafter absorbed into a city district by reason of the extension of the city limits of the city of Joplin. The court held that the extension of the city limits of Joplin automatically extended the limits of the Joplin school district and that the territory of the adjoining district so absorbed became a part of the city

district. The court then pointed out that the law had provided that the rest of the adjoining district could become a part of the city district, under the statutes, and then added:

"In such event, it appears that plaintiff's obligations would become defendant's obligations. * * * "

By inference, the court, in the foregoing language, was saying that the city district would not be liable for the debts of the adjoining district unless it absorbed all of the territory of the latter district.

We believe Section 10486, R. S. Mo. 1939, was designed to prevent a situation arising where, by the extension of the city limits of a city, an adjoining school district would be placed in a position where its bonded indebtedness would become a burden to it, or where it would be unfair to allow the city district to obtain a portion of the territory of the adjoining district without assuming the obligations of the adjoining district. By said statute, the portion of the district remaining, if it was affected as set out in the provisos of said statute, could force the city district to incorporate it into the city district also; and in such situation, under the rule announced in *State ex rel. v. Smith*, 121 S. W. (2d) 1060, supra, the city district would become liable for all of the indebtedness of the adjoining district.

CONCLUSION

It is, therefore, the opinion of this office that (1) a common school district may be organized into a consolidated school district, provided it has either fifty square miles of territory or has an enumeration of at least two hundred children of school age; (2) that if the limits of a city or town are extended so as to reach into the territory of an adjoining consolidated district, the limits of the city or town school district are automatically extended so as to

Mr. Joseph N. Brown

-9-

March 2, 1945

be the same as the city limits as extended; and (3) that in the event the limits of a city or town district are thus extended, the city or town district does not become liable for the obligations of the district of whose territory it has absorbed only a part.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HHK:ER

MAGISTRATE: Qualifications for office of Magistrate under
OFFICERS: Section 25, Article V, of the Constitution of
Missouri, 1945.

September 11, 1945



Honorable Joseph N. Brown
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an official opinion from this department, which reads:

"I have been asked to write you requesting an opinion as to whether or not a person who at the present time occupies the office of county judge is eligible as a candidate for the office of magistrate provided in Sec. 25, Art. 5 of the New Constitution, considered in connection with Sec. 2482, R. S. Mo. 1939.

"It is my opinion that the answer to this question is in the negative, however, the person in question desires an opinion from your office."

We are assuming in answering this request that same is made for the reason that the County Judge in question is not now licensed to practice law in the State of Missouri. Under Section 25, Article V of the Constitution of Missouri 1945, if said County Judge is a qualified voter of the state, resident of the County, twenty-two years of age and licensed to practice law in this state, or had heretofore at any time served as a Justice of the Peace in this state for at least four years, he could qualify for the office of magistrate under the 1945 Constitution.

Section 25, supra, reads in part as follows:

"* * *Judges of probate and magistrate courts shall be qualified voters of this state, and residents of the county. Probate judges shall be at least twenty five and magistrates at least twenty two years of age. Every judge and magistrate shall

September 11, 1945

be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, and except that persons who are now justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed."

The writer is unable to understand why you refer to section 2482, R. S. Mo. 1939, which provision merely provides that each judge of the County Court shall be a conservator of the peace throughout his County. The mere fact that he is made a conservator of the peace does not qualify him as a justice of the peace and because the County Court has, under the law, a concurrent duty with that of the justice of the peace will not of itself qualify him for the office of magistrate under section 25, supra.

CONCLUSION

It is, therefore, the opinion of this department that if the County Judge in question is not licensed to practice law in this state or has not heretofore been a justice of the peace at least four years and cannot meet the other qualifications contained in section 25, Article V, Constitution of Missouri 1945, said County Court is not eligible for the office of magistrate under section 25, Article V, Constitution of Missouri, 1945.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

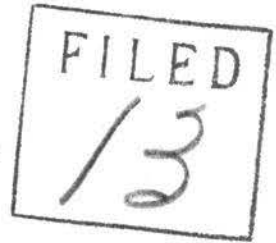
APPROVED:

J. E. TAYLOR
Attorney General

ARH:mw

SALARIES AND FEES: Board of Probation and Parole should pay the salary of the secretary employed by it and located in the office of the Lieutenant Governor; also pay their proportionate part of the janitor's salary used for it in said office.

January 31, 1945.



Mr. Donald W. Bunker
Director
Board of Probation and Parole
Jefferson City, Missouri

Dear Mr. Bunker:

This Department acknowledges receipt of your letters of January 4th and 16th, requesting an opinion from this office relative to the following questions. Your first question is as follows:

"Does the Board of Probation and Parole have the authority to pay the salary of the secretary to the Lieutenant Governor from the funds of the Board, even though her work may be divided between secretarial duties for the Lieutenant Governor and for the Board of Probation and Parole?

"In explanation of the reasons for the question I may state that the salary of the secretary to the Lieutenant Governor was paid by the Board of Probation and Parole to January 1, 1945, in view of the fact that the Lieutenant Governor was by statute ex officio member of the Board of Probation and Parole and his salary of \$3,000 was paid from the funds of the Board of Probation and Parole. At the last regular session of the legislature the Lieutenant Governor's salary was fixed at \$7,500 and the same was to be in lieu of all other sums to which he was entitled under existing law. He is still ex officio member of the Board,

but no part of his salary is to be paid from the funds of the Board of Probation and Parole."

Your second question is as follows:

"May the Board of Probation and Parole pay a salary to a janitor for the offices of the Lieutenant Governor who is ex officio member of the Board of Probation and Parole?"

"The Lieutenant Governor's offices are in the State Capitol Building while those of the Board of Probation and Parole are in the Prison Administration Building."

In answer to each of the above questions will state that Section 9161, R. S. Mo. 1939, the title of which is, "Board shall appoint secretary--compensation," provides:

"The Board shall appoint a suitable person as secretary and administrative officer of the Board. It shall also employ such assistants and employees as may be necessary to carry out the provisions of this article. The Board shall fix the compensation of its employees within the limit of moneys appropriated."

It appears that the real question involved, upon the examination of the same, is whether or not the secretary and janitor are employees of the Board of Probation and Parole or are employees of the office of the Lieutenant Governor, or if the change in the way the Lieutenant Governor is paid his salary would affect the hiring of a secretary and janitor by the Board for the Board of Probation and Parole.

As provided in Section 9158, R. S. Mo. 1939, the Lieutenant Governor is ex-officio member of the Board and insofar as these questions are concerned they would apply to him as a member of that Board rather than as the Lieutenant Governor.

Because the Legislature changed the method by which the Lieutenant Governor should be paid his salary, we can see no reason why this should affect the salary or employment of the secretary of the Board who is also an administrative officer of said board.

It necessarily devolves that the secretary is by law an administrative officer of the Board of Probation and Parole, subordinate to the three-member board, and the mere fact that said secretary may be located in the office of the Lieutenant Governor does not necessarily mean that said secretary is being furnished by the Board to the Lieutenant Governor in the capacity of that office, but is being furnished to him as a member of the Board of Probation and Parole.

Conclusion

In conclusion, therefore, it is the opinion of this office that it is immaterial as to how the Lieutenant Governor is paid his salary for that office, and the fact that the secretary of the Board of Probation and Parole is located in the same office room does not mean that she is the secretary to the Lieutenant Governor nor that her secretarial services are divided between the secretarial duties for the Lieutenant Governor and for the Board of Probation and Parole, her duties and work being limited to secretarial services for the Board of Probation and Parole. Therefore, said secretary should continue to receive her salary from the Board of Probation and Parole from the fund appropriated to said board.

The same rule should also apply to the janitor, as the Board of Probation and Parole is only paying its proportionate part of his salary for his services rendered to the Board in taking care of its office located in the office of the Lieutenant Governor.

Respectfully submitted,

GORDON P. WEIR
Assistant Attorney General

APPROVED.

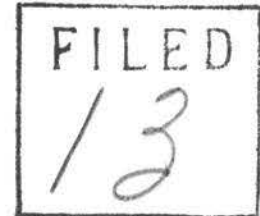
HARRY H. KAY
(Acting) Attorney General

COURTS:

When held on holidays.

March 8, 1945

3-13



Honorable L. M. Bywaters
Prosecuting Attorney
of Clay County
Liberty, Missouri

Dear Mr. Bywaters:

Your letter of February 20, requesting an opinion from this department on the authority of judges of a county court to hold court on legal holidays, has been received.

Your letter states:

"I would greatly appreciate an opinion from your office as to whether or not the County Court of a County can legally hold sessions and draw salary for their services on the days listed as public holidays in Section 15310 of the Revised Statutes of the State of Missouri of 1939."

In answering your inquiry, Sections 15310, 907 and 2027, R.S. Mo. 1939, should be read together. Those sections are respectively as follows:

Section 15310, R.S. Mo. 1939:

"The following days, namely: the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, any general primary election day, any general state election day, any thanksgiving day appointed by the president of the United States or by the governor of this state, and the twenty-fifth of December, are hereby declared and established public holidays; and when any of

such holidays falls upon Sunday, the Monday next following shall be considered such holiday."

Section 907, R.S. Mo. 1939:

"No person, on Sunday or on any other day declared and established a public holiday by any statute of this state, shall serve or execute any writ, process, warrant, order or judgment, except in criminal cases, or for a breach of the peace, or when the defendant is about leaving the county, or in any case of attachment or replevin when the debtor is about fraudulently to secrete or remove his effects, or in any injunction case; and the service of every such writ, process, warrant, order or judgment shall be void, and the person serving or executing the same shall be as liable to the suit of the party aggrieved as if he had done the same without any writ, process, warrant, order or judgment."

Section 2027, R.S. Mo. 1939:

"No court shall be open or transact business on Sunday, unless it be for the purpose of receiving a verdict or discharging a jury; and every adjournment of a court on Saturday shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been committed to a jury; but this section shall not prevent the exercise of the jurisdiction of any magistrate, when it shall be necessary in criminal cases, to preserve the peace or arrest the offender, nor shall it prevent the issuing and service of any attachment in a case where a debtor is about fraudulently to secrete or remove his effects."

The familiar rule of construction of where one subject is expressly dealt with all other subjects are excluded from the terms of a statute, applies in this case. That rule of construction is given in 59 C.J., page 984, and is as follows:

"In accordance with the maxim, 'expressio unius est exclusio alterius,' where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned;
* * *

Sunday is not declared to be a holiday by the terms of Section 2027, supra, but it is singled out as the only day upon which no court shall be held, except for certain purposes therein stated.

The above quoted rule of construction of statutes has been established and given usage by text writers and courts, in giving effect generally to the operation of statutes, in every jurisdiction. Under that rule where Section 907 prescribes that certain things therein prohibited shall not be done on Sunday or on established holidays, it is to be understood as not only not prohibiting the doing of all other kinds of judicial or official acts on those days, except Sunday, but the right and authority to do them is to be implied therefrom.

Thus, with Sunday being the only day when holding court is prohibited, with the exceptions named in Section 2027, and no other kinds of court proceedings or official acts being prohibited by Section 907, R.S. Mo. 1939, except those therein stated, it would seem to be conclusive that courts may convene on all such holidays as are mentioned in Section 15310, and that when so convened, they may transact all business not prohibited by Section 907.

The Supreme Court of Missouri has given effect and expression to the above quoted rule of construction in many decisions where statutes were being construed. In the case of *State ex inf. vs. Sweany*, 270 Mo. 65, the court had before it the question whether the statutes authorizing the division of a common school district into two new districts included and authorized a division of a town, city or consolidated school district into two new school districts.

In holding in that case that the statute did not give such authority the court, l.c. 691, said:

"Section 10881, in its present form, was enacted in 1909 (Laws 1909, p. 819, sec. 130). Prior to that time it had been expressly held by this court that the law providing for division of common school districts did not apply to village school districts. (State ex rel. v. Fry, 186 Mo. 198.) Such being the case the Legislature, when it enacted Section 10881, knew that the provisions of Section 10837, relating to the division of one common school district into two new districts, would not apply to town or consolidated districts unless it so provided in the act, and knowing this to be true and failing to so provide it would be but to do violence to the plain language used to hold that it expressed an intention to apply provisions other than those expressly mentioned. To so hold would be to violate the well known canon of statutory construction, viz.: That the expression of one thing is the exclusion of another."

In the case of State vs. Jaeger, 63 Mo. 403, the Supreme Court gave expression to this rule. That was a criminal case in which cases all criminal statutes are to be given strict construction. Our Supreme Court has applied this rule in both civil and criminal cases in the construction of statutes. Many decisions could be cited but we are supplying only two here. In the Jaeger case, supra, l.c. 409, 410, in applying the rule, the court said:

"In Howell vs. Stewart, (54 Mo. 400) we held in conformity to English decisions there noted, that where a statute defining an offense, designated one class of persons as subject to its penalties, all other persons not mentioned, were to be deemed as exonerated.
* * *"

In the application of the above rule of construction to these statutes under review, and the approval given to the rule in the cases and text above cited and quoted, we believe this opinion could safely rest upon that rule of construction as the basis for holding that courts, including county courts, may hold court on statutory holidays,

March 8, 1945

except where a holiday falls on Sunday, and county judges may charge their per diem therefor. We are not here, however, required to stand alone upon the rule of construction mentioned and discussed. Our Supreme Court and the Kansas City Court of Appeals have spoken on this question, and have rendered decisions holding that courts may be held on such statutory holidays.

In the case of State vs. Gould, 261 Mo. 694, the court had the matter of deciding whether courts may be held on holidays before it. On the question, the court, l.c. 705, said:

"The fact that the judgment and sentence against defendant were entered on May 30, a legal holiday, does not invalidate the sentence and judgment. By section 1785, Revised Statutes 1909, Sundays and other holidays are put on a par so far as the service of writs, process, warrants, orders and judgments is concerned. Such service is void. Section 3880, which prohibits the holding of courts on Sunday, does not, by its terms, include other holidays. In Bear v. Youngman, 19 Mo. App. 41, it was held that a judgment rendered by a justice of the peace on Thanksgiving day is not void under a statute which provides that a justice of the peace may hold court on any day except Sunday. It may be said that that case is not authority here. In Diesing v. Reilly, 77 Mo. App. l.c. 455, it was said: 'We are not, however, aware of any rule forbidding the performance of judicial duties on Christmas (twenty-fifth of December), or the other holidays mentioned in section 8952, Revised Statutes 1889. That section merely prohibits the service of civil process, except in certain attachment cases, but a judgment rendered on one of the days mentioned in the statute is not void. (Bear v. Youngman, 19 Mo. App. 41.)' "

The Kansas City Court of Appeals held that courts may be held on statutory holidays in the case of Lloyd v. Grady et al., 180 S.W. 1032. On the question, the court,

March 8, 1945

l.c. 1033, said:

"The record proper shows that plaintiff's motion to set aside the nonsuit and for a new trial was not filed until Tuesday, February 24, 1914. February 22d fell on Sunday, and under the statutes the following day was a legal holiday. Section 6701, R.S. 1909. Plaintiff had four days, after taking the nonsuit, in which to file his motion for a new trial (section 2025, R.S. 1909), and in computing the time the ensuing Sunday should be excluded. * * * The statute provides that no court shall be open or transact business on Sunday except for certain specified purposes. Section 3880, R.S. 1909. But there is no statute prohibiting the holding of court upon other statutory holidays, and in the absence thereof such days, not being dies non juridicus, must be included in computing the period for filing motions for a new trial. * * * In this case Monday, February 23d, must be included in the computation, and, so including it, the record shows that the motion was not filed in proper time."

CONCLUSION.

It is, therefore, the opinion of this department, considering the above cited and quoted statutes, and text authorities and decisions hereinabove quoted, that "the County Court of a County can legally hold sessions and draw salary for their services on the days listed as public holidays in Section 15310 of the Revised Statutes of the State of Missouri of 1939," unless such holiday should fall on Sunday.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

GWC:lr

COUNTY HOSPITAL: County Court is without authority to change location of county hospital built under provisions of Section 15192, R. S. Mo. 1939.

May 7, 1945.



Honorable John T. Buckley
Representative
Capitol Building, Room 403
Jefferson City, Missouri

Dear Mr. Buckley:

Your letter to General Taylor, dated May 2, 1945, together with letter to you under date of April 30, 1945, from Mr. Ronnie F. Greenwell, has been referred to me for an opinion as requested therein. These letters are respectively, as follows:

"I am enclosing a letter which is self-explanatory.

"Will you please give us an opinion as early as you can so that I can transmit it to Mr. Greenwell at Hayti."

"As you probably already know, we are holding an election May 19th for the purpose of issuing \$350,000.00 worth of bonds for a County Hospital to be located at or near Hayti. The question has come up regarding the location. Several reliable citizens, who are in a position to influence the results of the vote, believe it might be possible for the hospital to be built at some other town in the County after a favorable vote has been cast for the location at Hayti, therefore, it is extremely important that we have a ruling from the Attorney General at the earliest possible moment clarifying this particular matter. I wrote Mr. J. W. Burch,

Director of Extension Service, sometime ago and he referred the matter to the Attorney General but I have not heard from him as yet. In other words, we would like to know whether or not the location can be changed after the election. You are, of course, familiar with the situation in this County between Hayti and Caruthersville. Many voters in the Hayti territory feel that Caruthersville might be able to get a change in the location after a favorable vote has been cast for the hospital at Hayti.

"I will consider it a personal favor if you will get in touch with the Attorney General immediately and ask him to give us a ruling that can be published in our local papers regarding this matter."

The question which appears to be in Mr. Greenwell's letter is - Can the County Court change the location of a county hospital, after an election, from the location as stated in the petition presented to the court for that purpose?

With the scant information at hand and the information obtained from the County Clerk, we are taking the position that the petition requesting an election for a county hospital has been drafted in compliance with Chapter 126, Article 4, Section 15192, R. S. Mo. 1939, wherein it is stated as follows:

"Any county may establish a public hospital in the following manner: Whenever the county court of any county shall be presented with a petition signed by one hundred resident freeholders of such county, fifty of whom shall not be residents of the city, town or village where it is proposed to locate such public hospital, asking that an annual tax may be levied for the establishment and maintenance of a public hospital at a place in the county named therein, and shall specify in their petition the maximum amount of money proposed to be expended in purchasing or building said hospital, such county court shall submit the question to the qualified electors of the county at the next general

election to be held in the county, or at a special election called for that purpose, first giving ninety days' notice thereof in one or more newspapers published in the county, if any be published therein, or by posting written or printed notices in each township of the county, which notice shall include the text of the petition and state the amount of the tax to be levied upon the assessed property of the said county, which tax shall not exceed two (2) mills on the dollar, for a period of time not exceeding twenty years, and be for the issue of county bonds to provide funds for the purchase of a site or sites and the erection thereon of a public hospital and hospital buildings; and for the support of the same; which said election shall be held at the usual voting place in such county for voting upon county officers, and shall be canvassed in the same manner as the vote for county officers is canvassed."

It seems that this county hospital is to be, by the petition, located at or near Hayti, Missouri, and no doubt the petition is asking that said proposition be submitted to the voters for the purpose of levying an annual tax for the establishment and maintenance of such public hospital at a place in the county named in said petition.

It appears that if the petition, as presented, is drawn in compliance with the above section, stating the proposed location of the hospital, and submitted to the people for a vote to locate the hospital at this specific location, that the county court would then be without authority to select another or different location or community for said hospital from that named in the petition and as submitted to the voters, after a favorable election.

Conclusion

Therefore, it is the opinion of this department that where a county hospital is established under the provisions of

May 7, 1945

Section 15192, supra, that the county court would be without authority to locate such a hospital in any other locality than that named in the petition and presented to the voters, after a favorable election for that purpose.

Respectfully submitted,

GORDON P. WEIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GPW:EG

NEPOTISM: Relationship existing between step-father and step-son.

May 31, 1945

Filed: #13

Honorable L. Madison Bywaters
Prosecuting Attorney
Liberty, Missouri



Dear Sir:

Reference is made to your letter dated May 23, 1945, requesting an official opinion of this office, and reading in part as follows:

"I should like to have an opinion from your department on the following question. Can an assessor elected in November of 1944, who takes office June 1, 1945 appoint his step-father as a deputy without violating the nepotism provisions of the State Constitution."

By an election held on February 27, 1945, the people of the State of Missouri adopted a new Constitution, which became effective on March 30, 1945. The applicable provision of the Constitution of 1945 relating to your inquiry is Section 6 of Article VII, which reads as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

Your inquiry resolves itself into two component parts:

Honorable L. Madison Bywaters

(1) Is a county assessor a "public officer" within the meaning of the term as used in the above constitutional provision?

(2) Is the step-father related to the step-son within the prohibited degree, either by affinity or consanguinity?

In the determination of the first question, we have resorted to the following definition of "public officer" as found in State ex rel. Pickett v. Truman, 64 S. W. 105, 1. c. 106:

"In Mechem on Public Officers, pp. 1 and 2, sec. 1, it is said: 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' We have approved this definition in State ex rel. Walker v. Bus, 135 Mo. 325, 331, 332, 36 S.W. 636, 33 L.R.A. 616, State ex rel. v. Hackmann, 300 Mo. 59, 254 S.W. 53, 55, and Hasting v. Jasper County, 314 Mo. 144, 282 S.W. 700, 701; and it appears to be in harmony with the great weight of authority. * * * "

Applying this definition to the office of county assessor, we come to the conclusion that such officer is a "public officer" within the meaning of the term as used in the Constitution of 1945.

In the consideration of your second question, we have resorted to the definition of "consanguinity" as found in 12 C. J., at page 510, reading as follows:

"Consanguinity or kindred is the connection or relation of persons descended from the same stock or common ancestor, * * *."

Honorable L. Madison Bywaters

With this definition in mind, it is apparent that no relationship by consanguinity exists between a step-father and a step-son.

"Affinity" is defined in 2 C. J., at page 378, as follows:

" * * * the connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands toward them, and gives to the wife the same reciprocal connections with the relations of the husband; * * *."

Under this definition, it is apparent that by the marriage of the person to the mother of the assessor, a relationship by affinity was created.

Your attention is further directed to the hereinbefore quoted constitutional provision, particularly that portion thereof prohibiting the appointment of persons related "within the fourth degree." It thereupon becomes necessary to determine the degree of relationship existing between the step-father and step-son in order to determine whether or not such relationship is within the prohibited degree.

Two methods exist for the computation of degrees of relationship: The cannon law and the civil law. No appellate court decisions appear in the reports definitely fixing the method of reckoning the degrees of kinship under the nepotism provision of the Constitution of 1945, or under Section 13 of Article XIV, being the comparable nepotism provision of the Constitution of 1875. However, in other states, under similar constitutional provisions, computation has generally been made under the civil rule. We believe that the courts of this state, when the matter is directly presented for decision, will adopt the civil rule in computing the degree of relationship.

The rule under the civil law for the computation of the degrees of relationship is stated in 12 C. J., at page 511, reading as follows:

Honorable L. Madison Bywaters

"By the civil law, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending."

In the situation presented by your letter of inquiry, under application of the quoted rule for reckoning the degree of relationship, it is found that the step-father is related in the first degree to the step-son, and therefore is within the prohibited degree of relationship as established by Section 6 of Article VII of the Constitution of 1945.

CONCLUSION

In the premises, we are of the opinion that a county assessor is a "public officer" within the meaning of that term as used in Section 6 of Article VII of the Constitution of 1945; and that the step-father of such public officer is within the fourth degree of relationship to such public officer, and cannot be appointed deputy assessor without subjecting such officer to forfeiture of office.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

COUNTY TREASURERS, WARRANTS: Treasurer should not pay warrants upon which judgments have been rendered.

June 13, 1945



Honorable Chas. B. Butler
Prosecuting Attorney
Doniphan, Missouri

Dear Mr. Butler:

The Attorney General acknowledges receipt of your letter of June 2, 1945, in which you make the following request for an opinion:

"A little more than ten years ago the Standard Printing Company of Hannibal, Missouri, sued Ripley County on county warrants and obtained a judgment for about ten thousand dollars.

"The judgment is now barred by the Statute of Limitations. The County Treasurer of this county now has about four thousand dollars that could be paid on part of the warrants for which the judgment was rendered. The Statute of Limitations on county warrants does not begin to run until the money is in the treasury to pay the warrant. The question I would like to have your opinion on is this: If these warrants on which a judgment has been rendered are presented to the County Treasurer after the Statute of Limitations has run against the judgment, should the treasurer pay the warrants."

By Section 13831, R. S. Mo. 1939, the county court is authorized to order its clerk to issue a warrant when it ascertains that a sum of money is due from the county. In the

case of International Bank of St. Louis v. Franklin County, 65 Mo. 105, the Supreme Court in discussing a county warrant very aptly and with brevity described the nature of a warrant at l. c. 112:

"* * * In short, it is to all intents and purposes the promissory note of the county. Abundant authorities, if indeed authorities are needed where the expression of the legislative will is so plain, sustain this position. * * *"

Also, in the case of Steffen v. Long, 165 Mo. App. 254, the following is found at l. c. 258:

"A warrant is, in legal effect, a promissory note."

However, it is non-negotiable and title passes only by assignment. American Employes Ins. Co. v. Manufacturers & Mechanics Bank, 85 S. W. (2d) 174; Section 15834, R. S. Mo. 1939.

As a county warrant is similar to a promissory note the rules of law applicable to judgments on promissory notes should govern the question you ask.

The general rule regarding the effect of reducing a cause of action to judgment is stated as follows in Vol. 30, American Jurisprudence, page 903, Section 150:

"One effect of a judgment is to merge therein the cause of action on which the action is brought, from the date of the judgment."

This rule has been followed in several Missouri cases, among these cases are McKnight v. Taylor, 1 Mo. 282; Crim v. Crim, 162 Mo. 544, l. c. 554; and State ex rel. Noe v. Cox, 19 S. W. (2d) 695, from which the following quotation is taken at l. c. 699:

"The rule or principle of law announced by this court in the cited cases is recognized by respondents, for the opinion of respondents recites: 'Technically speaking, a valid judgment upon a note merges the cause of action which existed upon the note into the judgment,

June 13, 1945

and recovery must then be had upon the judgment and not upon the note.' But the opinion of respondents does not declare the validity of the Illinois judgment. In truth, the ultimate ruling and judgment of the respondent Court of Appeals, directing judgment to be entered for plaintiff upon the notes, seemingly indicates that the respondents reached the conclusion that the Illinois judgment is invalid, and therefore that such invalid judgment did not merge the cause of action upon the notes. Such is evident from the following recitals contained in respondents' opinion: 'If a former suit had been filed and an invalid judgment rendered on these notes, the recovery in this case should be upon the notes. If the judgment were valid, the recovery should be upon the judgment.' * * *

Under this rule the debt owed by Ripley County to the Standard Printing Company, which was evidenced by county warrants, merged into the judgment on the warrants. The warrants then ceased to be evidence of the indebtedness, being superseded by the judgment. A new warrant could have been issued to pay the judgment but the old one would no longer be effective for the purpose of withdrawing funds from the county treasury.

Conclusion

If the warrants upon which judgments have been rendered are presented to the county treasurer, the treasurer should not pay the warrants.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

INTOXICATING LIQUOR: Liquor tax provided in Section 4900, R. S. Mo. 1939, to be paid before sale or delivery in the State of Missouri for Naval areas in the State of Missouri.

August 9, 1945

FILED

13

Honorable Edmund Burke, Supervisor
Department of Liquor Control
State of Missouri
Jefferson City, Missouri

Dear Sir:

This department acknowledges receipt of your letter of July 31, 1945, requesting our opinion. Your letter of request is as follows:

"The U. S. Navy has established a Merchandise Service office, U. S. Navy, 342 Madison Avenue, New York, New York, which procures for commissioned officers' messes intoxicating liquor for the use of the officers' messes.

"The Navy claims that the State of Missouri is without authority to charge any tax such as provided by Sec. 4900, R. S. Mo., 1939, on whiskey purchased by the Merchandise Service office and shipped directly the distributor to the commissioned officers' mess located at Naval Air Station, St. Louis, Missouri, and the commissioned officers' mess, Coast Guard Barracks, St. Louis, Missouri, respectively.

"I enclose herewith a copy of a letter from H. J. Donnelly, Jr., Commander, USNR, setting out in detail the Navy plan above referred to. Will you please let me have your opinion as to whether

or not the Department of Liquor Control should require the tax provided by Sec. 4900, R. S. Mo., 1939, on intoxicating liquor purchased through the Merchandise Service office, U. S. Navy, above referred to and shipped by the wholesaler to the two officers' messes above mentioned?"

For the purposes of this opinion it may be assumed that the State of Missouri is without authority to regulate the United States Navy or its instrumentalities; that under Article I, Section 8, Clause 17 of the United States Constitution, the Federal government has exclusive jurisdiction over areas purchased by the Federal government, with the consent of the State Legislature, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; that under Article IV, Section 3, Clause 2 of the United States Constitution, Congress has the power to make all needful rules and regulations respecting property belonging to the United States; and that such areas, being integral parts of the government, are not subject to taxation or other regulation by the several states. *Mayo v. United States*, 319 U. S. 441; *Ohio v. Thomas*, 173 U. S. 176; *Johnson v. Maryland*, 254 U. S. 51; see also *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95; *U. S. v. Query*, 121 F. (2d) 631.

Upon investigation and for the purposes of this opinion, we find that the Coast Guard Barracks, St. Louis, Missouri, is not contained in the legal description of the territory ceded by the State of Missouri to the United States for naval purposes, as contained in the Missouri Laws of 1943, page 628, and for the purposes of this opinion we concede only that the United States has been granted exclusive jurisdiction over land within the boundaries of the State of Missouri for naval purposes, known as the Naval Air Station, located in St. Louis County, Missouri, and more particularly described in Subsections a and b of Section 1, Missouri Laws of 1943, page 629.

However, we find that the Legislature of the State of Missouri, in ceding exclusive jurisdiction to the United States for all purposes, has saved and reserved, to the State of Missouri, the right of taxation, which is found in the Act of the Session Laws of Missouri 1943, page 630, which provides as follows:

"Exclusive jurisdiction in and over said lands so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes, saving and reserving, however, to the State of Missouri the right of taxation to the same extent and in the same manner as if this cession had not been made; * *"

The State of California, by legislative act, ceded exclusive jurisdiction to the United States to several tracts of land in the State of California, for park purposes, reserving, however, to the State of California the right to serve civil or criminal process and further, the right to tax persons and corporations, their franchises and property on the lands included in said parks. Subsequently, a question arose as to the excise tax provisions of the alcoholic control act, laying a tax at a specified rate per unit sold on beer, wine and distilled spirits sold "in this state." The park company, by contract with the Department of Interior, enjoyed the franchise and controlled all the concessions within the park. The company urged, because the State of California had ceded exclusive jurisdiction to the United States, giving up their power to regulate intoxicating liquors within the ceded area, that the taxing features were such a part of the regulatory features that they could not be separated and given effect. The case was determined by the United States Supreme Court in *Collins v. Yosemite Park & Curry Co.*, 58 S. Ct. 1009, 1. c. 1017, which held as follows:

"* * * Thus the argument is made that section 23, St. 1937, p. 2143, imposes an excise tax on beer and wine sold by an importer, and applies not to the Company, which sells beverages direct to consumers, but only to importers licensed under the Act, and restricted by their license to sales to retail licensees.

"Neither party cites any pertinent state court decision. There is nothing in the statute itself compelling the conclusion that the excise tax and regulatory provisions are inseparable, or requiring the Court to overturn the presumptively correct determination of the administrative officers that the sales within the Park are subject to the excise tax. Section 23 provides that

an excise tax is imposed upon beer and wine sold 'in this State by (an) * * * importer.' Reference to provisions of the Act defining the terms used in this section makes it plain that although appellee Company does not import beverages into California within the meaning of the Twenty-First Amendment, U. S. C. A. Const. Amend. 21, it is an importer for purposes of the Act, and, as such, is subject to the tax. The Act is restricted to sales 'in this State,' but that term embraces all territory within the geographical limits of the State. There is nothing in the Act restricting this taxing provision to sales made by or to persons licensed under the Act. Section 23 clearly applies to beer and wine sold by appellee Company in the Park, and it applies to such sales regardless of the applicability vel non of the regulatory or licensing provisions of the Act.

"Section 24, St. 1937, p. 2144, imposes an excise tax upon all distilled spirits 'sold in this State by rectifiers or wholesalers.' Appellee Company does not come within the statutory definition of either of these groups, but Sec. 24 must be read in conjunction with section 33, St. 1937, p. 2153. Section 33 provides that the 'tax imposed by section 24 of this act upon the sale of distilled spirits shall be collected from rectifiers and wholesalers of distilled spirits and payment of the tax shall be evidenced by stamps issued by the board to such rectifiers and wholesalers,' and continues with the provision that 'in exceptional instances the board may sell such stamps to on- and off-sale distilled spirits licensees and other persons.' (*Italics added.*) In view of the atypical circumstances of the present case, we cannot consider erroneous an interpretation by the board that stamps, to be affixed to the liquor containers, might be issued and sold to appellee Company. These provisions, like sec. 23, are independent of any licensing or regulatory provisions of the Act, and may be enforced independently, as a purely tax or revenue measure.

"The objection that collection of the taxes may not only interfere with an agency of the United States but may be actually partly collected from the National Government because of its interest in the profits under the contract is fully answered by the fact that the United States, by its acceptance of qualified jurisdiction, has consented to such a tax."

The California alcoholic beverage control act is similar to the Missouri liquor control act. The Missouri liquor control act provides for additional charges to be collected by the Supervisor of Liquor Control, under Section 4900, R. S. Mo. 1939, which provides as follows:

"(a) For the privilege of selling in the state of Missouri spirituous liquors, including brandy, rum, whiskey, and gin, and other spirituous liquors and alcohol for beverage purposes, there shall be paid, and the supervisor of liquor control shall be entitled to receive, the sum of eighty cents (\$.80) per gallon or fraction thereof.

"(b) For the privilege of selling light wines, as herein defined, the sum of two cents (\$.02) per gallon; and for the privilege of selling fortified wines, as herein defined, the sum of ten cents (\$.10) per gallon. The term 'light wines' as herein used, means any fermented wine containing not to exceed fourteen per centum (14%) of alcohol by weight. The term 'fortified wines', as herein used, means all other wines, containing in excess of fourteen per centum (14%) of alcohol by weight.

"(c) The amounts required to be paid by this section shall be evidence by stamps or labels purchased from the supervisor of liquor control and affixed to the container of such spirituous liquor. The person who shall first sell such liquor in this state shall be liable

for such payment and shall purchase, affix and cancel the stamps or labels required to be affixed to such container.

"(d) Any person who sells to any person within this state any intoxicating liquors mentioned in subsection (a) of this section, unless the same be contained in a container stamped or labeled as provided in this act, shall be guilty of a felony and shall be punished by imprisonment in the state penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail for a term of not less than one month nor more than one year, or by a fine of not less than fifty dollars nor more than one thousand dollars, or by both such fine and imprisonment.

"(e) It shall be unlawful for any person to remove the contents of any container containing any of the intoxicating liquors mentioned in subsection (a) of this section without destroying such container, or to refill any such container in whole or in part with any of the liquors mentioned in subsection (a) hereof. Any person violating the provisions of this subsection shall be guilty of a misdemeanor.

"(f) Every manufacturer, distiller and wholesale dealer in this state, shall, before shipping, delivering or sending out any of the liquors mentioned in subsection (a) of this section, to any person in this state, cause the same to have the requisite denominations and amount of stamps or labels required by this section affixed as stated herein, and cause the same to be cancelled, and shall, at the time of shipping or delivering such liquors, make a true duplicate invoice of the same, showing the date, amount and value of each class of such liquors shipped or delivered, and retain a duplicate thereof, subject to the use and inspection of the supervisor of liquor control and his representatives for two (2) years.

"(g) Any person who shall sell in this state any intoxicating liquor without first having procured a license from the supervisor of liquor control, authorizing him to sell such intoxicating liquor shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail, for a term of not less than three months nor more than one year, or by a fine of not less than one hundred (\$100.00) dollars nor more than one thousand (\$1,000.00) dollars, or by both such fine and imprisonment."

Under the Rules and Regulations of the Supervisor of Liquor Control of the State of Missouri, promulgated and adopted on August 16, 1945, page 18, Regulation No. 7, subparagraph (b), page 20, provides as follows:

"No sale or delivery of spirituous liquors or wines shall be made in this State without the proper number and amount of Missouri excise or inspection stamps or labels being affixed to the containers thereof.

"Any spirituous liquor or wine shipped into, sold or offered for sale in this State without such excise or inspection stamps or labels of approximate number and denomination being affixed thereto, shall be deemed to be contraband and shall be by the Supervisor or his inspectors seized and disposed of as such.

"No person other than a licensed distiller, rectifier or wine manufacturer shall possess in this State any spirituous liquor or wines without the proper number and amount of Missouri excise or inspection stamps or labels being affixed to the containers thereof.

"Every non-resident distiller, rectifier, wine manufacturer or wholesaler licensed to do business in this State as a solicitor

shall affix the proper number and amount of Missouri excise or inspection stamps or labels to the containers of such spirituous liquors or wines before shipment thereof into this State."

In construing the above section, in an official opinion by this Department, dated May 24, 1935, it was held that the person who shall first sell intoxicating liquor to any person, firm or corporation in this state, shall purchase, affix and cancel the stamps or labels required to be affixed to such container.

Section 4932, R. S. Mo. 1939, provides as follows:

"Any person who shall haul or transport intoxicating liquor, whether by boat, airplane, automobile, truck, wagon, or other conveyance, in or into this state, for sale, or storage and sale in this state, upon which the required inspection, labeling or gauging fee or license has not been paid, shall upon conviction thereof, be deemed guilty of a misdemeanor."

In construing the above section this department held, in its opinion dated May 24, 1935, supra, that the stamps must be affixed by the outstate permit holder before he transports any spirituous liquor into this state, and that the Supervisor of Liquor Control should sell the outstate liquor dealer the necessary stamps to be so affixed.

The tax stamps as provided for in Section 4900, supra, being paid by the person first selling intoxicating liquor to any person, firm or corporation in the State of Missouri, it could not be said that the tax was being levied on the United States government or one of its instrumentalities directly. In this respect these questions were answered effectively in *Graves v. People of State of New York*, 59 S. Ct. 595, 1. c. 598:

"It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to

the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

Again, at l. c. 602, 603, and 604:

"Mr. Justice FRANKFURTER, concurring.

"I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to

individual opinions. But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society. A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation.

"For one hundred and twenty years this Court has been concerned with claims of immunity from taxes imposed by one authority in our dual system of government because of the taxpayer's relation to the other. The basis for the Court's intervention in this field has not been any explicit provision of the Constitution. The States, after they formed the Union, continued to have the same range of taxing power which they had before, barring only duties affecting exports, imports, and on tonnage. Congress, on the other hand, to lay taxes in order 'to pay the Debts and provide for the common Defence and general Welfare of the United States', Art. 1, Sec. 8, U.S.C.A. Const., can reach every person and every dollar in the land with due regard to Constitutional limitations as to the method of laying taxes. But, as is true of other great activities of the state and national governments, the fact that we are a federalism raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike

down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

"The arguments upon which *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *McCulloch v. Maryland*. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' *Id.*, at page 431 of 4 Wheat. This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion in *McCulloch v. Maryland*. The seductive cliché that the power to tax involves the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely the doctrine that the immunities are correlative--because the existence of the national government implies immunities from state taxation, the existence of state governments implies equivalent immunities from federal taxation. When this doctrine was first applied Mr. Justice Bradley registered a powerful dissent, the force of which gathered rather than lost strength with time. *Collector v. Day*, 11 Wall. 113, 128, 20 L. Ed. 122.

"All these doctrines of intergovernmental immunity have until recently been moving in the

realm of what Lincoln called 'pernicious abstractions'. The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holme's pen: 'The power to tax is not the power to destroy while this Court sits'. *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223, 48 S. Ct. 451, 453, 72 L. Ed. 857, 56 A.L.R. 583 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount. These decisions have encountered increasing dissent. In view of the powerful pull of our decisions upon the courts charged with maintaining the constitutional equilibrium of the two other great English federalisms, the Canadian and the Australian courts were at first inclined to follow the earlier doctrines of this Court regarding intergovernmental immunity. Both the Supreme Court of Canada and the High Court of Australia on fuller consideration--and for present purposes the British North America Act, 30 & 31 Vict., c. 3, and the Commonwealth of Australia Constitution Act, 63 & 64 Vict., c. 12, raise the same legal issues as does our Constitution--have completely rejected the doctrine of intergovernmental immunity. In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined.

"The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been

judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it. Neither *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 10 L. Ed. 1022, and its offspring, nor *Collector v. Day*, supra, and its, can stand appeal to the Constitution and its historic purposes. Since both are the starting points of an interdependent doctrine, both should be, as I assume them to be, overruled this day. Whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live is matter for another day."

The tax on intoxicating liquor, as set out in Section 4900, is a nondiscriminatory tax on intoxicating liquor applied at specified rates. It could not be in form or substance a tax upon the United States or its instrumentalities, or its property, nor could it be paid for by the instrumentality or the government from their funds, and the only possible basis for implying a constitutional immunity from the State Liquor Tax on intoxicating liquor sold to a government instrumentality, or one of its agencies, is that the economic burden of the tax is in some way passed on, so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions. The Congress has never mentioned in its legislation, nor can the State of Missouri recognize that the sale or traffic in intoxicating liquor to the Merchandise Service Office of the United States Navy for use in its commissioned officers' messes, is a necessary function of government, or that such tax upon intoxicating liquor would in any manner interfere with the proper functioning of the United States Navy.

In this opinion we do not think it is necessary to go into the question of state interference with shipments through common

August 9, 1945

carriers originating outside the state and consigned to a commissioned officers' mess located in a federal area that has been ceded by the State of Missouri to the United States Navy for navy purposes. In the case of Johnson v. Yellow Cab Transit Co., 64 S. Ct. 622, the United States Supreme Court held that the State of Oklahoma did not have the power to control liquor transactions on the Fort Sill reservation, having previously ceded said territory to the federal government for military purposes. However, the State of Missouri does not presume any power to enforce regulatory measures under its police powers in the territory in which it has ceded exclusive jurisdiction to the Navy, and the regulatory features of the Missouri Liquor Control Act are separable from the taxing features, and the taxing features of the Liquor Control Act are in full force and effect in the ceded territory, as much as if no act of cession had been made.

CONCLUSION

Therefore, it is the opinion of this Department that the tax provided for in Section 4900, R. S. Mo. 1939, must be paid on all spirituous liquors or wines before such spirituous liquors or wines shall be sold or delivered in the State of Missouri for or to the Naval Air Station or Coast Guard Barracks in St. Louis, Missouri.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

26 Smith

SALARIES AND FEES:) County surveyor in counties of 29,000 to
COUNTY SURVEYOR:) 50,000 inhabitants, who is also ex officio
highway engineer, can charge for fees allow-
able under statutory provisions.

September 26, 1945

FILED

13

Honorable J. W. Buffington
Office of the Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

Receipt of your request for an opinion, under date of September 19, 1945, is hereby acknowledged, and reads as follows:

"The county court of this county has requested the writer to obtain an opinion from your office relative to this question: The county surveyor who is also ex officio highway engineer receiving a salary as such engineer from the county in the amount provided for by statute has been called upon in the past and also very recently to survey county property at the request and direction of the county court.

"The last surveying done by him was a survey for the purpose of obtaining certain necessary data on the county hospital grounds preparatory to adding an addition to said hospital.

"The official in question has rendered a bill to the county as a charge for the last mentioned survey.

"The county court has heretofore paid him for surveys made on county property, but as there are likely to be additional surveys made with respect to building programs by the county the question now

asked is can this official charge for surveys as surveyor, which position he actually fills, notwithstanding he is being paid the maximum salary as ex officio county highway engineer?"

It is a strict rule of construction in this state, consistently adhered to by the courts, when dealing with compensation for special officials that an officer claiming compensation must be able to place his finger upon the statutory authority for same. An officer can recover compensation only when specifically authorized by statute. Williams vs. Chariton County, 85 Mo. 645 (1885); State ex rel. vs. Adams, 172 Mo. 1 (1903); Hill vs. Butler County, 195 Mo. 511 (1906). It is said that an officer in Missouri is presumed to render his services gratuitously unless some specific statutory authorization is found for the payment of such services. King vs. Riverland Levee District, 279 S. W. 195, 196 (1926).

Section 13425, R. S. Mo. 1939, provides as follows:

"County surveyors shall be allowed fees for their services as follows: For calculating the quantity of land in each survey, when called upon by any party, the sum of thirty cents for each distance contained in the boundary of said survey.

For every survey actually made\$1.50

And the further sum of one cent for every chain lineal measure above one hundred chains.

For calculating the quantity of each division made in a tract of land, town lots

excepted\$0.75

For making each plat40

For recording a plat and certificate.. .50

For every copy of a plat and certificate50

For traveling to the place of survey and returning, for every mile08

For ascertaining and planting each corner, under article 7, chapter on 'Evidence' 1.00

For recording each certificate under
article 6, chapter on 'Evidence'... 1.00
For each day's attendance as a wit-
ness under article 6, chapter on
'Evidence' 1.50
For delivering depositions to the
recorder under article 6, chapter
on 'Evidence'35"

The courts have adopted and followed an entirely different rule with reference to the allowance of expenses; and items which could not reasonably have been foreseen by the Legislature, and which may vary from time to time depending upon the economic trend of the country. The general rule as to such matters is stated in 46 C. J., page 1018, Section 246, in the following language:

"But where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and have reimbursement therefor, and where a public duty is demanded of an officer without provision for any compensation, the expense must be borne by the public for whose benefit it is done."

This rule has been strictly adhered to in Missouri. County of Boone vs. Todd, 3 Mo. 140 (1833); Harkreader vs. Vernon County, 216 Mo. 696 (1909); Buchanan vs. Ralls County, 283 Mo. 10, 222 S. W. 1002 (1920).

In Ewing vs. Vernon County, 216 Mo. 681, 695, the court in commenting upon this difference made between "compensation" and "expenses" said:

"* * * Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with

this case relating to outgo. Such, we take it, is the doctrine of the cases cited in the former paragraph of this opinion, and it comports with reason. Further, if the custom was to deliver a deed to the U. S. Government to be transmitted by mail, as seems to have been the case, then such delivery is reasonably well within the contemplation of the statutory duty to deliver 'to the party or his order.'

"It must not be expected that this court will throw down statutory safeguards for the protection of the treasures of the counties of this State, or in any way countenance looseness in their business affairs. But, on the other hand we shall not construe our statutes so as to produce a harsh or ridiculous result and one not within the fair meaning of our laws.

"The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'"

Section 8660. R. S. Mo. 1939, provides as follows:

"The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly

qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8657, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor: Provided, that in counties in which the provisions of this article with reference to the appointment of a county highway engineer have not been suspended as hereinafter provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court: Provided, however, that in all counties in this state which contain or which may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than 100,000 inhabitants by the last decennial census, the county surveyor shall be ex officio county highway engineer, and his salary as surveyor and ex officio county highway engineer shall be not less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court, and all fees collected in such counties by the surveyor, for his services as surveyor, shall be paid into the county treasury, to be placed to the credit of the county revenue fund: Provided, also, that in the counties last above mentioned the county surveyor, as surveyor and ex officio county highway engineer, may appoint, subject to the approval of the county court, such assistants as may be necessary, and no assistant shall receive more than twenty-one hundred dollars per annum: Provided

further, that in all counties in this state which contain or may hereafter contain two hundred thousand and less than four hundred thousand inhabitants, and which county or counties contain one hundred and fifty miles or more of macadamized roads, outside of municipal corporations, and which county or counties pay to the county surveyor a salary of three thousand dollars or more annually, the county surveyor of such county or counties shall be ex officio county highway engineer: Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

Audrain County, according to the Census of 1940, has a total population of 22,673 and therefore falls within the bracket of counties containing 20,000 to 50,000 inhabitants. The statute makes specific reference to the fees collected by the county surveyor for surveying in counties of more than 50,000 inhabitants adjoining or containing cities of 100,000 inhabitants, stating that they "shall be paid into the county treasury, to be placed to the credit of the county revenue fund." The same statute makes no such reference to counties of different numbers of inhabitants and it may therefore be presumed that if the Legislature had intended a similar disposition of surveyor's fees in other counties, it would have so enacted.

Conclusion

The county surveyor in counties containing not less than 20,000 inhabitants or more than 50,000 inhabitants, notwithstanding the fact that he is also ex officio county highway engineer,

Hon. J. W. Buffington

-7-

Sept. 26, 1945

can charge for such fees as are allowable under the statutory provisions.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

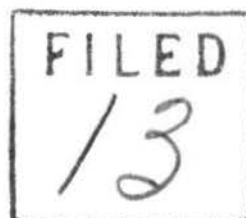
APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

RECORDER OF DEEDS: To issue certified copy of records free of charge to veterans when such records are to be used to claim benefits under the Service Men's Readjustment Act of 1944.

October 9, 1945



Honorable L. Madison Bywaters
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

Receipt of your request for an opinion from this office, under the date, October 6, 1945, is hereby acknowledged and which request reads as follows:

"I should like to have an official opinion from your office on the following matter.

"Should a Recorder of Deeds furnish certified copies of records free of charge when they are to be used to secure certain privileges granted to veterans under the G-I Bill of Rights; also, are any such certified copies requested by veterans to be used in securing loans, schooling, etc., under the G-I Bill of Rights considered to be in the sense of a claim upon the government of the United States so that Section 15077 of the Revised Statutes for 1939 would apply?"

Your question comes directly to the point of whether or not the benefits offered veterans in the Servicemen's Readjustment Act of 1944, better known as the GI Bill of Rights, could be the subject of a "claim upon the Government of the United States" as is contemplated in Section 15077, R. S. Mo. 1939, which reads as follows:

"Whoever a certified copy or copies of any public record in the state of Missouri are required to perfect the claim of any soldier, sailor or marine, in service or honorably discharged, or any dependent of such soldier, sailor or marine, for a United States pension, or any other claim upon the government of the United States, they shall, upon request be furnished by the custodian of such records without any fee or compensation therefor."

In a search for the legal definition of the word "claim" we find in the case of Mellus v. Potter, 91 Cal. App. 700, 704, 267 P. 563, 564, the following:

"* * 'Claim,' in its primary meaning, is used to indicate the assertion of an existing right. In its secondary meaning, it may be used to indicate the right itself."

Also in the case of Adamson v. Wolfe, 139 S. W. (2d) 674, 1. c. 679, 200 Ark. 360, as to the meaning of the word "claim" we find the following:

"* * 'The term has been specifically defined as meaning a demand of a right, or of an alleged or supposed right; a calling on another for something due or supposed to be due; an active assertion of a right and the demand for its recognition; an assertion, demand, or challenge, of something as a right; * *"

The term "rights" in the case of Lonas v. State, 50 Tenn. (3 Heisk.) 287, 1. c. 306, is defined as:

"* * The word rights, is generic, common, embracing whatever may be lawfully claimed. * *"

And in the case of Atchison & R. R. Co., v. Baty, 29 Am. Rep. 356, 6 Neb. 37, 1. c. 40:

October 9, 1945

"* * the term 'right' in civil society, is defined to mean that which a man is entitled to have, or to do, or to receive from others within the limits prescribed by law."

There can be no doubt that the Servicemen's Readjustment Act of 1944 does confer rights upon veterans of World War II. These rights are subject to demand on the part of such veterans and when such demand is made a claim is to be constituted. In order to be able to claim benefits under the GI Bill of Rights, except employment benefits, a man or woman must have served in the active forces of the Army, Navy, Marine Corp, or Coast Guard, or one of their components, at any time from September 16, 1940, to the cessation of hostilities. He or she must have served ninety (90) days, except if discharged for a disability suffered in the line of duty. Release from active service must be under conditions other than dishonorable. Employment benefits, excepted above, are free to veterans of all the wars of the United States.

It has been held in the case of *Sorvik v. United States*, 52 Fed. (2d) 406, 1. c. 410, that legislation passed for the benefit of veterans should be construed liberally in the favor of the veterans:

"And in measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff, we must bear in mind the remedial purposes of the World War Veterans' Act (38 USCA Sec. 421 et seq.), which the courts have repeatedly held should be liberally construed in favor of the veterans. *United States v. Eliasson* (C. C. A. 9) 20 F. (2d) 821, 824; *United States v. Sligh* (C. C. A. 9) 31 F. (2d) 735, 736, certiorari denied 280 U. S. 559, 50 S. Ct. 18, 74 L. Ed. 614; *United States v. Phillips* (C.C.A. 8) 44 F. (2d) 689, 692; *Glazow v. United States* (C.C.A. 2) 50 F. (2d) 178."

In the case of *People ex rel. McDonough v. Mills Novelty Co.*, 192 N. E. 236, it was held that legislation that

October 9, 1945

is enacted to the benefit of veterans is not to be regarded as relief, but as a recognition of an obligation owing to those falling within the law for services rendered in defense of the Nation.

It is our belief that the recorder of deeds should furnish certified copies of records free of charge when they are to be used to secure the rights granted to veterans under the Servicemen's Readjustment Act of 1944, and that these privileges constitute rights of the serviceman to which he may make a claim upon the government of the United States as provided in Section 15077, R. S. Mo. 1939.

Conclusion

A recorder of deeds should furnish certified copies of records free of charge to veterans when they are to be used to secure benefits offered veterans under the Servicemen's Readjustment Act of 1944. Such benefits as are offered under this act are rights and as such constitute a "claim upon the government of the United States" by veterans, as is contemplated in Section 15077, R. S. Mo. 1939.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

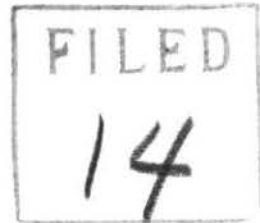
J. E. TAYLOR
Attorney General

JMA:EG

EMBALMING
CORONER

: Authority of coroner to send dead body
to undertaker.

May 4, 1945



State Board of Embalming
Monett, Missouri

Attention: Mr. Floyd C. Callaway, Secretary

Gentlemen:

This will acknowledge receipt of your request for an
official opinion under date of March 21, 1945, which reads:

"Owing to the many complaints we
have over the State regarding the
authority or power of the Coroners,
the members of the State Embalming
Board has asked me to write you for
an opinion on same.

"What we want to know, can a
Coroner turn a body over to any cer-
tain undertaker?

"Can he authorize a dead human
body to be embalmed, without consent
of next of kin?

"Can he refuse to release a body
to the next of kin?"

The coroner in the State of Missouri is a constitu-
tional officer who can exercise only such powers as are limited
by the statutes. In Crenshaw v. O'Connell, 150 S.W. (2d) 489,
l.c. 491, the court said:

"The coroner, as we know him in
this State, is a constitutional officer,
Mo. St. Ann. Const. art. 9, Secs. 10
and 11, whose powers and duties with
respect to the holding of inquests and
autopsies are more or less specifically

defined and limited by statute, the same being Sections 13227-13268, R.S. Mo. 1939, Mo. St. Ann. Secs. 11608-11649, pp. 4279-4290."

Section 9766, Revised Statutes of Missouri 1939, places the burden upon the attending physician to prepare a certificate of death, stating in detail the cause of the death and contributory causes for any violence; its nature shall be stated and whether accidental, suicidal, or homicidal. Section 9766 reads as follows:

"The certificate of death shall contain the following items:

(1) Place of death, including state, county, township, city, the ward, street and house number. If in a hospital or other institution, the name of the same to be given instead of the street and house number. If in an industrial camp, the name of the camp to be given.

(2) Full name of decedent. If an unnamed child, the surname preceded by 'unnamed.'

(3) Sex.

(4) Color or race - as white, black (negro or negro descent), Indian, Chinese, Japanese or other.

(5) Conjugal condition - as single, married, widowed or divorced.

(6) Date of birth, including the year, month and day.

(7) Age, in years, months and days.

(8) Place of birth; city, or town, state or foreign country.

(9) Name of father.

(10) Birthplace of father; state or foreign country.

- (11) Maiden name of mother.
- (12) Birthplace of mother; city or town, state or foreign country.
- (13) Occupation. The occupation to be reported of any person who had any remunerative employment, women as well as men.
- (14) Signature and address of informant.
- (15) Date of death, including the year, month and day.
- (16) Statement of medical attendant of decedent, fact and time of death, including the time last seen alive.
- (17) Cause of death, including the primary and contributory causes or complications, if any, and duration of each.
- (18) Signature and address of physician or official making the medical certificate.
- (19) Length of residence at place of death and in state. Special information concerning deaths in hospitals and institutions, and of persons dying away from home, including the former or usual residence, and place where the disease was contracted.
- (20) Place of burial or removal.
- (21) Date of burial or removal.
- (22) Signature and address of undertaker.
- (23) Official signature of registrar, with the date when certificate was filed, and registered number.

"The personal and statistical particulars (items 1 to 13) shall be authenticated by the signature of the informant who may be any competent person acquainted with the facts.

"The statement of facts relating to the disposition of the body shall be signed by the undertaker or person acting as such.

"The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased, who shall specify the time in attendance, the time he last saw the deceased alive and the hour of the day at which the death occurred. And he shall further state the cause of death, so as to show the course of disease or sequence of causes resulting in the death, giving the primary cause, and also contributory causes, if any, and the duration of each. Indefinite and unsatisfactory terms, indicating only symptoms of disease or conditions resulting from disease, will not be held sufficient for issuing a burial or removal permit; and any certificate containing only such terms as defined by the state registrar shall be returned to the physician for correction and definition. Causes of death, which may be the result of either disease, or violence, shall be carefully defined; and, if from violence, its nature shall be stated, and whether (probably) accidental, suicidal, or homicidal. And in case of deaths in hospitals, institutions, or away from home, the physician shall furnish the information required under this head (item 19), and shall state where, in his opinion, the disease was contracted."

Section 9764, Revised Statutes of Missouri 1939, requires said certificate of death to be filed with the local or state registrar before a permit of removal or burial be issued by said registrar, with one exception, that no removal permit shall be required when a dead body is removed for the purpose of preparing same for burial, but under no circumstances shall said body be interred, deposited in a vault or tomb, cremated or otherwise disposed of until the permit of the registrar has been properly issued. Section 9764 reads:

"The body of any person whose death occurs in the state shall not be interred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed from or into any registration district until a permit for burial, removal or other disposition shall have been properly issued by the local registrar of the registration district in which the death occurs:
Provided, no such removal permit shall be required when a dead body is removed for

the purpose of preparing such body for burial, but no such body shall be interred, deposited in a vault or tomb, cremated or otherwise disposed of until a permit so to do has been properly issued by the local registrar of the registration district in which the death occurs. And no such burial or removal permit shall be issued by any registrar until a complete and satisfactory certificate of death has been filed with him as hereinafter provided: Provided, that when a dead body is transported by common carrier into a registration district in Missouri for burial, then the transit and removal permit, issued in accordance with the law and health regulations of the place where the death occurred, when said death occurs outside of the state of Missouri, shall be accepted by the local registrar of the district, into which the body has been transported for burial or other disposition, as a basis upon which he shall issue a local permit, in the same way as if the death occurred in his district, but shall plainly enter upon the face of the burial permit the fact that it was a body shipped in for interment, and give the actual place of death; but a burial permit shall not be required from the local registrar of the district in which interment is made when a body is removed from one district in Missouri to another in the state, for purpose of burial or other disposition, either by common carrier, hearse, or other conveyance; and no local registrar shall, as such, require from undertakers or persons acting as undertakers any fee for the privilege of burying dead bodies."

In case of no medical attendants, the duty falls upon the undertaker to notify the registrar, then the registrar shall notify the local health officer, whoever that may be, for investigation before any permit shall be issued. However, when it is probable that death was caused by unlawful or suspicious means, the matter should be referred to the coroner for investigation and certification. Under any circumstances, in the final analysis the burden is upon the undertaker to see that the death certificate is properly filed with the registrar. Section 9767 reads as follows:

"In case of any death occurring without medical attendance, it shall be the duty of

the undertaker to notify the registrar of such death, and when so notified, the registrar shall inform the local health officer and refer the case to him for immediate investigation and certification, prior to issuing the permit: Provided, that when the local health officer is not a qualified physician, or when there is no such official, and in such cases only, the registrar is authorized to make the certificate and return from the statement of relatives or other persons having adequate knowledge of the facts: Provided further, that if the circumstances of the case render it probable that the death was caused by unlawful or suspicious means, the registrar shall then refer the case to the coroner for his investigation and certification. And any coroner whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall state in his certificate the name of the disease causing death, or the means of death; causes or violence, and whether (probably) accidental, suicidal, or homicidal, as determined by the inquest; and shall, in either case, furnish such information as may be required by the state registrar properly to classify the death."

Section 9768, Revised Statutes of Missouri 1939, reads:

"The undertaker, or person acting as undertaker, shall be responsible for obtaining and filing the certificate of death with the local registrar of the district in which the death occurred, and securing a burial or removal permit prior to any disposition of the body. He shall obtain the personal and statistical particulars required from the person best qualified to supply them, over the signature and address of his informant. He shall then present the certificate to the attending physician, if any, or to the health officer or coroner, as directed by the local registrar, for the medical certificate of the cause of death and other particulars necessary to complete the record, as specified in section 9767. And he shall then state the facts required relative to the date and place of burial,

over his signature, and with his address, and present the completed certificate to the local registrar, who will issue a permit for burial, removal or other disposition of the body. The undertaker shall deliver the burial permit to the sexton, or person in charge of the place of burial, before interring or otherwise disposing of the body; or shall attach the transit permit containing the registration removal permit to the box containing the corpse, when shipped by any transportation company; said permit to accompany the corpse to its destination, where, if within the state of Missouri, it shall be delivered to the sexton or other person in charge of the place of burial."

said: In *Crenshal v. O'Connell*, supra, the court at l.c. 492

"As to this, suffice it to say that under the statute having to do with the coroner's duties in respect to registration of deaths, Sec. 9767, R.S. Mo. 1939, Mo. St. Ann. Sec. 9047, p. 4191, the coroner is authorized to make a certificate of death only when the case is referred to him by the local registrar as one without an attending physician and one where the circumstances of the case render it probable that the death was caused by unlawful or suspicious means. The purpose of such reference is, of course, to have an investigation by the coroner as the officer whose duty it is to hold an inquest on the body of any deceased person; and when such a case is properly referred to the coroner, he conducts his investigation, and then executes the certificate of death required for a burial permit, stating therein the disease causing death or the means of death, and otherwise making the same conform to the requirements of the statute. *O'Donnell v. Wells*, 323 Mo. 1170, 21 S.W. 2d 762; *Patrick v. Employers Mutual Liability Insurance Co.*, supra; *Gilpin v. Aetna Life Insurance Co.*, 234 Mo. App. 566, 132 S.W. 2d 686."

Section 13227, Revised Statutes of Missouri 1939, designates the coroner as the conservator of the peace in his respective county and provides that he shall take inquest in violent and casual deaths. Said section reads as follows:

"A coroner shall be a conservator of the peace throughout his county, and shall take inquests of violent and casual deaths happening in the same, or where the body of any person coming to his death shall be discovered in his county, and shall be exempt from serving on juries and working on roads."

Section 13231, Revised Statutes of Missouri 1939, requires the coroner to summon a jury of six men to view the body, whenever it comes to his attention that any person in the county has come to his death by violence or casualty.

Whenever an inquest shall be held and there shall be no relative or friend of the deceased, nor any person willing to bury the body, or any person whose duty it is to do same, the coroner shall procure a coffin and attend to the burial, for which he shall be reimbursed by the County Court. Section 13245, Revised Statutes of Missouri 1939, reads:

"Whenever an inquest shall be held, if there be no relative or friend of the deceased, nor any person willing to bury the body, nor any person whose duty it is to attend to such burial, the coroner shall procure a cheap, plain coffin, and cause a grave to be dug and the body to be conveyed thereto and buried. It shall be the duty of the coroner, in so doing, to avoid all unnecessary expense, and to render to the court an accurate statement of all money expended by him for such purpose; and the county court shall make to him a reasonable allowance for his actual expenses in procuring the coffin, hauling the body to the grave, digging the grave and burying the body; and also a reasonable allowance, according to the circumstances, for his own time and services in attending to such preparations and burial."

The only time that a coroner has anything whatsoever to do with a dead body is when he has notice of violence or casualty. It is then within his discretion and it becomes a judicial matter for him to determine whether an inquest shall be held.

Your requests are not very specific, in that you do not state the circumstances and facts surrounding the particular case you have in mind. The law is well established in this State that the next of kin is entitled to the dead body, and we think

the next of kin may send the body to whatever undertaker they may choose. In *Wall v. Railroad*, 184 Mo. App. 127, 1.c. 132, the court said:

" **It is true that a corpse is not property in the commercial sense of that term, but the most tender affections of the human heart cluster about the bodies of one's loved ones who have passed. Therefore, in accord with high and lofty sentiment, the courts have come to recognize and declare what is termed a quasi property right, which entitles the husband or wife or next of kin to the possession or control of the body for the purpose of decent sepulture. (See *Litteral v. Litteral*, 131 Mo. App. 306, 111 S.W. 872; *Wilson v. St. Louis & S. F. R. Co.*, 160 Mo. App. 649, 142 S. W. 775.) In this view, one may recover for any injury done to, or indignity committed upon, the body of his deceased as though a property right with respect thereto obtained in him. (*Wilson v. St. Louis & S. F. R. Co.*, 160 Mo. App. 649, 142 S.W. 775; *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85; *Douglass v. Stokes*, 149 Ky. 506, 149 S.W. 849.) * * * * "

See also *Patrick v. Employers Mut. Liability Ins. Co.*, 118 S. W. (2d) 116, 1.c. 121, 122, wherein the court said:

"It is also insisted that the petition affirmatively alleges facts showing that plaintiff's remedy was exclusively under the compensation act. In view of this contention it is well to inquire into the nature of the cause of action in cases of this kind. In such cases the widow does not sue on the theory that the corpse is property in the commercial sense, but rather that she has a quasi property right in the remains of her husband, entitling her to the possession and control of the body for the purpose of preparing and interring it decently. *Wall v. St. Louis San Francisco R. R. Co.*, 184 Mo. App. 127, 168 S.W. 257; *Litteral v. Litteral*, 131 Mo. App. 306, 111 S.W. 872; *Wilson v. Railroad Co.*, 160 Mo. App. 649, 142 S.W. 775."

Volume 17, C. J., Sections 4 and 5, page 1139, read:

"Upon the death of a married person, the surviving spouse has the paramount right as to the custody of the remains of the deceased and its burial.

"If there is no surviving spouse, the right to select a place of burial and to see to the proper interment of the deceased rests primarily with the next of kin rather than with a stranger to the blood. The right of burial by the next of kin is in the order of their relation to the decedent, as children of proper age, parents, brothers, and sisters and more distant kin. If the next of kin is a minor, then the right devolves upon the next of kin of full age. If the surviving spouse is absent, the next of kin are entitled to exercise the right of burial. The consent of the next of kin to the burial of a deceased relative by another, in order to constitute a waiver of their rights, must be fully and voluntarily given."

Therefore, it is the opinion of this department, in view of the foregoing citations and statutory provisions, that a coroner has no legitimate reason for having anything to do with a dead body in the absence of violence or casualty, and in such case it may be possible that in order to determine the cause of death, for instance the writer has in mind death caused by taking poison, that an inquest be held before the body is embalmed. However, we think that after the inquest is held the next of kin would have a legal right to the possession of said body within a reasonable time, and, in the absence of any statutory provision authorizing the coroner to send it to some certain embalmer, that the next of kin would have the right to determine where to send the dead body. Also, in view of Section 13245, supra, when there is no relative or next of kin willing to bury said body and defray the expense thereof, the coroner shall send the body to any undertaker for burial purposes.

All of your questions are closely related and we believe we have fully covered your requests.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General

SCHOOL FUND LOANS: Applicability of Sec. 7, Art. IX, of the Constitution of 1945 to outstanding school fund loans and to investments of the capital of county and township public school funds.

October 22, 1945

FILED

15

10/26

County Court of Jasper County
Carthage, Missouri

Attention: Hon. Omer L. Carrothers
Presiding Judge

Gentlemen:

Reference is made to your letter of October 17, 1945, requesting an official opinion of this office, and reading as follows:

"Under Article 9 - Section 7, regarding County and Township School Funds Loans: we would like to know when the dead line is set for these loans to be liquidated and if the loan is for 5 years and did not become due until 1948, if the County Court will be forced to liquidate this loan sooner than the maturity date.

"We would also like to know if the County Bonds can be purchased with this money the same as State Bonds and School District Bonds."

With respect to the question propounded by the first paragraph of your letter of inquiry, we direct your attention to an opinion of this department delivered under date of March 19, 1945, to the Honorable G. R. Chamerlin, Prosecuting Attorney, Harrisonville, Missouri. A copy of such opinion is enclosed herewith, and we believe it will serve to answer your question.

October 22, 1945

With respect to the question propounded in the second paragraph of your letter of inquiry, we direct your attention to a portion of Section 7, Article IX, of the Constitution of 1945, reading as follows:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund. * * * "

Although you have not made specific inquiry regarding the date when such investments may be made, we enclose herewith a copy of an opinion of this department delivered under date of March 19, 1945, to the Honorable Alvin B. Walker, Prosecuting Attorney, Milan, Missouri, as it does cover this precise feature of the matter under consideration.

Inasmuch as county bonds are not among the types of investment enumerated in the above quoted constitutional provision, it is necessary to determine whether or not such bonds are by implication contained therein.

The only possible group of securities which might encompass county bonds would be that denominated "bonds of the state." We do not find this phrase having been defined by an appellate court of the State of Missouri, but do find that this phrase has received a judicial construction by the Supreme Court of the State of Washington. Such construction is found in the case of *Lumbermen's Indemnity Exchange v. State of Washington*, 113 Wash. 82. That court was construing a statute which read, in part, as follows:

October 22, 1945

" * * * that if any such company * * * shall have fifty per centum or more of its assets invested in any bonds or warrants of this state, * * *."

Claim had been made by the appellant insurance company that United States Liberty Loan Bonds were included within the phrase quoted. In disposing of this contention, the Supreme Court of the State of Washington said:

" * * * it is sufficient to say that a bond upon which the state is not liable for payment cannot be a bond of the state. The people of this state, as citizens of the state, are not called upon to pay, nor can they be taxed to pay, these bonds, nor is their credit pledged in security of them, nor are the assets of the state pledged for their payment, and as there is no obligation of any kind on the people of this state, or the state itself, to pay these bonds, they are not bonds of the state."

Applying these principles to bonds issued by a county, we believe it is apparent that such bonds are not "bonds of the state," within the meaning of the phrase as used in Section 7, Article IX, of the Constitution of 1945.

CONCLUSION

In the premises, we are of the opinion that Section 7, Article IX, of the Constitution of 1945 does not require the immediate liquidation of outstanding county school fund loans, and that such action will necessarily be taken only when such loans become due subsequent to the effective date of this portion of the Constitution of 1945; and we are further of the opinion that all matters relating to the collection and preservation of present county school fund loans will be governed by the existing statutes relating thereto until July 1, 1946, unless such statutes be sooner repealed or amended by act of the Legislature.

October 22, 1945

We are further of the opinion that bonds of a county are not "bonds of the state," within the meaning of that phrase as used in Section 7, Article IX, of the Constitution of 1945, and that county and township public school funds cannot lawfully be invested in the bonds of a county.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

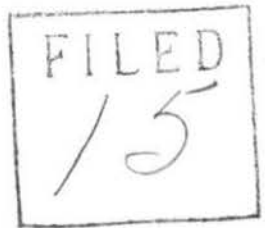
INHERITANCE TAX:

STATUTE OF LIMITATIONS:

Applicability to Sec. 577, R.S. Mo. 1939,
and Sec. 597, R.S. Mo. 1939 (prior to
amendment, Laws 1943, p. 307).

*Tax maybe reassessed
prior to distribution of estate*

October 25, 1945



11/7
Mr. F. Leland Carpenter, Clerk
Probate Court
City of St. Louis
Civil Courts Building
St. Louis, Missouri

Dear Sir:

Reference is made to your letter, dated April 26, 1945,
requesting an official opinion of this office, and reading as
follows:

"The St. Louis Union Trust Company has
suggested that I ask you for an opinion
on the inheritance tax problems described
in this letter and the attached copy of a
letter from the St. Louis Union Trust
Company.

"The inheritance law prior to 1943 required
the Court in assessing the inheritance tax
to fix a tax based on the highest possible
contingency, and further provided that the
payment of this tax could be postponed by
the filing of a bond. In a large number of
cases, the highest possible contingency was
extremely remote, and as a consequence, a
considerable number of bonds have been filed
in this Court to secure the future payment
of such taxes.

"Due to the expense of procuring such bonds,
the Court was asked to accept personal bonds.
It was our idea that such bonds were unsatis-
factory, and the Court was unwilling to accept
a personal bond without some further security.
After considerable discussion, a procedure was
worked out by which the Court agreed to accept

a personal bond on condition that assets of an equal value are deposited with some bank or trust company under an escrow agreement permitting the release of the assets only upon the final determination of the tax liability.

"In a number of these cases, the wills have provisions permitting partial vesting of interest from time to time, and prior to the time at which a final determination of the tax can be made. In such cases the ultimate liability from payment of tax is reduced, and the taxpayer is probably entitled to have his bond reduced and a portion of the escrow estate released.

"The mechanical procedure for so reducing the bond and releasing the estate is quite complicated. It usually requires a complete tentative re-determination of the tax which necessitates a lengthy order by this Court. It is then necessary that all the records relating to the tax be changed and a copy of the amended order be sent to the State Treasurer, and that all the State's records be changed.

"Several cases have now arisen in which the reduction of tax liability is quite small and does not justify the expense of making a complicated re-assessment. A petition for re-assessment in one such case involving a reduction of \$40.00 has been presented for our consideration, and when I suggested that such a change seemed unnecessary, the petitioner stated that they were afraid that the statute of limitation might begin to run against their claim, unless the change was made. As I did not think that a statute could run under these circumstances, and as the St. Louis Union Trust Company has no other reason for filing such a petition, I was requested to seek your opinion on this question.

"You will note that under these circumstances there is no present claim for a refund of any taxes which have been already paid, but simply

October 25, 1945

a reduction of the State's contingent rights to collect additional taxes at a future date. It would appear to me that no statute of limitation can run until a claim arises in favor of the estate for a refund or a claim in favor of the State for the payment of additional tax.

"I would appreciate your opinion on this question."

The letter received by you, under date of March 22, 1945, from John E. Gaskill, Jr., Trust Officer, St. Louis Union Trust Company, reads, in part, as follows:

"As you know the Missouri inheritance tax has been assessed in many estates on the highest possible contingency basis. In a great many instances the executors and the heirs have decided to pay a smaller amount of tax (usually based on a probable basis) and have posted a Surety Bond in three times the difference between the tax paid and the tax determined on the highest possible basis. These Surety Bonds are generally secured by escrowing assets having a readily marketable value equal to or in excess of the amount of the Surety Bond.

* * * * *

"Our experience is that frequently encroachments on the principal for hospital bills, doctor bills, operations, etc., become necessary. * * * * *

"It has been the practice of this company to have the inheritance tax re-determined, the Surety Bond reduced and the escrowed assets released as each such encroachment, as suggested above, happens. However, you have called my attention to the fact that this runs up considerable court costs and there is no urgency about having the tax re-determined on a lower basis. You likewise suggested that I defer action from time to time until more sizable amounts are involved.

"Frankly the only reason that we have indulged in this practice, upon the happening of each encroachment, is because we wanted to be sure that we filed the application for the reduction timely. I must admit that as far as I know there is no statute of limitation running against us and I do not think that the two year statute, applicable to refunds of taxes paid, is applicable to the matter about which this letter is written. It is my understanding that where the statute is silent there is no statute of limitation applicable."

The question which you have proposed deals solely with the mechanics involved in redetermination of the inheritance tax due and the period within which such redetermination should be made. Section 597, R. S. Mo. 1939 (prior to its amendment, found in Laws of 1943, page 307), to which you have referred, reads, in part, as follows:

"* * * When the property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred:
* * * Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore

made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited. * * * "

From the last quoted paragraph it is apparent that the valuation to be used in determining the amount of inheritance tax due on such transfers is to be ascertained at the date that the persons entitled thereto shall come into the beneficial enjoyment or possession thereof. The payment of such tax may have been postponed until such time, under the provisions of Section 577, R. S. Mo. 1939, reading, in part, as follows:

" * * * provided, that the persons, institutions, association or corporation beneficially interested in property chargeable with said tax may elect not to pay the same until they shall become into actual possession or enjoyment of such property, then in that case said person, association or corporation shall give bond payable to the state of Missouri, in a penal sum three times the sum or amount of taxes due upon such transfer, with such sureties as the probate court, or any other court having jurisdiction of the matter, may approve, conditioned for the payment of said tax and interest thereon from the date such tax is due at such time or period as they or their representatives may come into the actual possession or enjoyment of said property, which bond shall be executed in duplicate and one copy filed in the office of the probate judge of the proper county, and the other with the state treasurer: provided further, that every person, institution, association or corporation shall make and file with the probate court of the county a full verified return of said property, or interest therein, within one year of the death of the decedent, with the bond and sureties as above provided; and provided further, said person, institution, association or corporation shall renew said bond every five years after the date of the death of decedent."

Considering the two sections together, it becomes apparent that in each instance there can be no increase in the tax due, but necessarily a reduction will take place, as the tax was required to have been originally assessed at the rate applicable upon the happening of the most remote contingency. After the bond has been given, as provided by Section 577, R. S. Mo. 1939, no payment of tax is required until such time as the tax shall have been determined as provided by Section 577, supra. Until the date that such liability becomes fixed in amount, even the penalty of the bond is subject to change as conditions affecting the ultimate amount of property to be received by the heir, legatee or devisee may vary. It is only upon the final determination of the ultimate tax liability that any cause of action accrues in favor of the State of Missouri.

It is elementary law that under no circumstances do statutes of limitation begin to run until the cause of action accrues. We quote from *Baron v. Kurn*, 164 S. W. (2d) 310, 1. c. 316:

" * * * Ordinarily a plaintiff's cause of action accrues upon a defendant's failure to do the thing at the time and in the manner contracted, and a statute of limitation begins to run when a suit may be maintained therefor. * * * " (Emphasis ours.)

Application of this rule necessarily involves consideration of the time when a cause of action for the collection of inheritance tax accrues in favor of the State of Missouri under circumstances in which a bond has been given. We direct your attention to a portion of Section 577, R. S. Mo. 1939, which reads as follows:

" * * * conditioned for the payment of said tax and interest thereon from the date such tax is due at such time or period as they or their representatives may come into the actual possession or enjoyment of said property, * * * " (Emphasis ours.)

From the above quoted portion of the statute, it is apparent that a right of action accrues to the State of Missouri only

October 25, 1945

at such time as the beneficiaries come into the actual possession of the property transferred. Such being the case, it is clear that, until such time, the penalty of the bond is contingent and subject to change in the event that interests may vest. Inasmuch as no right of action can previously accrue in favor of the State of Missouri, any changes in the bond cannot affect the right of the State of Missouri to make collection thereon should default be made in the payment of such inheritance tax as may be found to be due at the time provided by the quoted statute.

Prior changes in the amount of the bond must necessarily all be toward reducing the amount of the penalty thereof. Changes which are made are solely for the convenience of the persons interested in the estate and are of no concern to the State of Missouri, so long as the bond is maintained at an amount equal to three times the prospective maximum ultimate liability. We do not believe that any statute of limitation is applicable to the time when such changes may be made prior to the final determination of such liability for inheritance tax.

CONCLUSION

In the premises, we are of the opinion that application may be made to the probate court having jurisdiction of the administration of an estate for reduction in the penalty of the bond given under the provisions of Section 577, R. S. Mo. 1939, at any time prior to the determination of the tax due from the beneficiaries of such estate, as provided by said section, and that no statutes of limitation are applicable to the right of the beneficiaries to have such penalty of the bond so changed to conform with conditions resulting from the vesting of interests, as no right of action accrues to the State of Missouri until the beneficiaries come into the actual possession of the property transferred from such estate.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

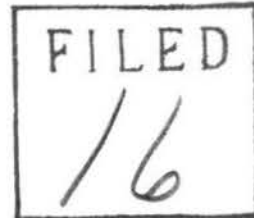
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

SCHOOLS: Applicability of Section 7, Article IX, of the new Constitution of Missouri to outstanding county school fund loans.

March 19, 1945



Honorable G. R. Chamberlin
Prosecuting Attorney
Harrisonville, Missouri

Dear Sir:

Reference is made to your letter under date of March 7, 1945, requesting an official opinion of this office, and reading as follows:

"I would like to have the benefit of your advice on Section 7, Article 10, Page 56, of the pamphlet on the new Constitution.

"This section apparently provides that the outstanding County Loans be liquidated without extension of time, and I would like to have your opinion just how to advise the County Court as to when they should begin liquidating these loans.

"I have already checked over the report of the County and have furnished the County Court with all of the older loans, one having run out - being made in 1924, and several others were made in 1925 and should be taken in at once irrespective of the new constitution. There are a number of others where the interest has lagged back and obviously the property is not very valuable, and I have suggested to the County Court to close those out at once, but since it will be quite a turnover in liquidating all of these, I presume you will recommend some standard of procedure in this behalf."

March 19, 1945

Apparently through a typographical error, you have mentioned Section 7 of Article X of the new Constitution; however, we find that the only portion of the new Constitution referring to the matters about which you inquire is Section 7 of Article IX.

With respect to the question suggested by the second paragraph of your letter, we direct your attention to the following portion of Section 7, Article IX, of the new Constitution of Missouri:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund.

* * * "

Because of the lack of judicial construction of this section, we necessarily are constrained to construe it in accordance with general rules.

It is our thought that the quoted portion of the section should read as though the following words were interpolated following the underscored portion quoted above: "beyond the time when such principal shall become due according to the tenor of the instrument evidencing the loan, subsequent to the effective date of this Constitution."

In view of the fact that the present statutes relating to the lending of school funds by the various county courts are in conflict with Section 7, Article IX, of the new Constitution of Missouri, such statutes will remain in full force and effect until July 1, 1946, unless sooner re-

March 19, 1945

pealed or amended to conform with the new Constitution, as provided by Section 2 of the Schedule attached to the new Constitution.

With respect to the question suggested in the third paragraph of your letter, your attention is directed to the above statement in regard to the time at which the present statutes relating to these loans will become inoperative. In the interim, your county court will necessarily be guided by the provisions of the present statutes with respect to the collection of interest and principal, foreclosure of outstanding loans, and all other matters incident to the lending, collection and preservation of the money belonging to the county school funds.

CONCLUSION

In the premises, we are of the opinion that Section 7, Article IX, of the new Constitution of Missouri does not require the immediate liquidation of outstanding county school fund loans, and that such action will necessarily be taken only when such loans become due subsequent to the effective date of this portion of the new Constitution; and we are further of the opinion that all matters relating to the collection and preservation of present county school fund loans will be governed by the existing statutes relating thereto until July 1, 1946, unless such statutes be sooner repealed or amended by act of the Legislature.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

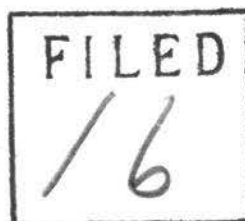
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CONSTITUTIONAL LAW:)
EFFECTIVE DATE OF STATUTES:)

Time for preparing resolution authorized
by Section 29, Art. III of the Constitu-
tion. Effect of Section 659, R. S. 1939.

May 22, 1945.

5/31



Dr. Charlton F. Chute
Director of Research
Legislative Research Committee
State Capitol Building
Jefferson City, Missouri

Dear Dr. Chute:

Under date of May 9, 1945, you wrote the Attorney
General requesting an opinion as follows:

"A resolution has been introduced in the House of Representatives which provides that the General Assembly recess from June 29, 1945 to the following September 4th. In the event of such recess and reassemblage, could the legislature then provide that its enactments, other than appropriation acts and those containing an emergency clause, become effective at a date less than ninety days after it may finally adjourn, and in the event the legislature did not have a thirty day recess between September 4th and its final adjournment?

"The following may clarify this question; namely, if the legislature reconvenes on September 4th and passes some legislation other than appropriation acts and acts containing an emergency clause and does not then recess for a period of thirty days and continues in session until less than ninety days prior to January 1, 1946, could such legislation be made to take effect on January 1, 1946, in view of the provisions contained

in Section 29, Article III of the present Constitution?

"In an opinion directed to the then Secretary of State, the former Attorney General, (see Laws of 1943, pages 1088 to 1090, inclusive) ruled upon the effective date of enactments under the former constitutional provisions. It has been suggested, however, that such opinion does not apply at the present time, due to some difference in the former and present Constitution."

In your letter you direct attention to an opinion from the office of the Attorney General, dated August 31, 1943, to the Honorable Dwight H. Brown, then Secretary of State, construing and applying Section 36, Article IV of the Constitution of 1875 and Section 659, R. S. Mo. 1939, to bills enacted by the 62d General Assembly, which opinion is not in harmony with the provisions of the present Constitution.

As your letter is understood, there are two questions to be answered concerning the effective date of bills enacted by the 63d General Assembly under the present Constitution and statutes. These questions are:

(1) May the General Assembly, under the Constitution, recess for more than thirty days and upon termination of the recess then fix by resolution the effective date of bills passed, which effective date would be less than ninety days after the final adjournment of the legislative session?

(2) Is there any law, other than Section 29 of Article III of the Constitution, to be considered in determining the effective date of bills enacted by the 63d General Assembly?

For the purpose of convenience, Section 29 of Article III of the Constitution, referred to in your letter, is herein set out:

"No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency

which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

The appellate courts of Missouri have not had occasion to interpret Section 29 of Article III of the new Constitution. No decisions of the courts of other states interpreting a similar constitutional provision have been found. The proceedings of the Constitutional Convention, including the journals and debates, have been examined with reference to deliberations on Section 29 of Article III, but nothing has been found which is of assistance in interpreting Section 29.

Therefore, it is necessary for us to undertake to interpret this section under general principles of law, and at this point it is desired to call attention to certain fundamental principles of law relating to the interpretation and construction of constitutions.

The intention of the makers of the Constitution must be determined when interpreting constitutional provisions. State ex inf. Norman v. Ellis, 325 Mo. 154, 28 S. W. (2d) 363; Graves v. Purcell, 337 Mo. 574, 85 S. W. (2d) 543. The established rules of construction applicable to statutes apply to the construction of constitutional provisions. State ex rel. Buchanan County v. Imel, 242 Mo. 293, 146 S. W. 793; C. J. S., Vol. 16, Section 15, page 51.

Necessary to the solution of the first question is a determination of when the Constitutional Convention intended the joint resolution, provided for in Section 29 of Article III of the Constitution, to be made. This clause of the Constitution is as follows:

"* * * if the general assembly recesses for thirty days or more it may prescribe

by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

There are two constructions possible in regard to this clause: (1) that the joint resolution may be passed after a reassembly of the Legislature following the recess referred to, and that such resolution would apply to laws passed not only before the recess but after reassembly; or (2) that the resolution must be passed at the time of the recess; thus, only laws passed before the recess, would be effected.

It is our opinion that the second interpretation is the only one consistent with reason and logic for the following reasons. The intention of the Constitutional Convention is to be ascertained and other portions of the Constitution adopted at the same time are to be considered and harmonized with the provision here under consideration. *State v. Harris*, 337 Mo. 1052, 87 S. W. (2d) 1026; *Hull v. Baumann*, 345 Mo. 159, 131 S. W. (2d) 721; *State ex rel. Central Surety Corp., v. Tax Commission*, 348 Mo. 171, 153 S. W. (2d) 43.

Article I, Section 13 of the Bill of Rights of the new Constitution, provides that no ex post facto law, or law retrospective in its operation, can be enacted. It is our opinion that the first interpretation of the proviso in Section 29 would leave open the possibility of the enactment of legislation, which would, in fact, be retrospective. This is true, because, if the resolution provided therein was made after reassembly of the Legislature, the resolution could be made more than ninety days after the beginning of the recess. Thus, the act would be effective and go into operation at a date which would be prior to the date the resolution was adopted.

It is, therefore, impossible, under such an interpretation, to harmonize Section 29 with Section 13 of the Bill of Rights. We do not believe the framers of the Constitution intended a construction inconsistent with the Bill of Rights.

The clause which we are here considering is in the form of a proviso or exception to the prior wording of Section 29. It is a fundamental legal principle that provisos should be construed with reference to the preceding parts of the clause

to which they are attached. Joplin Supply Co., v. Smith, 182 Mo. App. 212, 167 S. W. 649; Allen Estate Ass'n, v. Boeke, 300 Mo. 599; Ex parte Andrews, 223 Mo. App. 863.

The first interpretation of the proviso would render the prior portion of the section meaningless, since, under that interpretation, the joint resolution could be passed at such a time that under no circumstances would any law take effect after adjournment of the session. The main body of Section 29 provides that the latter is exactly what should be the case, except in the singular circumstances as set out in the proviso. Such a result is inconsistent with general legal principles. Joplin Supply Company, v. Smith, supra; State v. Murphy, 347 Mo. 484, 148 S. W. (2d) 527; Castilo v. State Highway Commission, 312 Mo. 264.

Further, in construing a statute or a constitutional provision, the court may inquire into the consequences of any proposed interpretation of the law. McGill v. City of St. Joseph, 225 Mo. App. 1038, 38 S. W. (2d) 725.

The consequences of the interpretation which would allow the resolution to be passed after recess would, it seems, lead to an unreasonable, absurd and unjust result. It would mean that the people would have no anticipation of the Legislature, and since the main part of Section 29 would be controlling until a resolution was passed, there would be no reason for any assumption that a law would become effective prior to ninety days after the adjournment of the session. Thus, it is entirely possible that the public would be subjected to the provisions of a legislative enactment prior to the passage of the resolution, which resolution would be the act which later made it become effective. It would seem unjust to say that the public would be subject to an act which it had no reason to believe had become effective. Absurd or unreasonable construction will not be given to legislative acts or constitutional provisions and the courts in all cases will avoid such construction if possible. State v. Irvine, 335 Mo. 261, 72 S. W. (2d) 96; Chrisman v. Terminal R. R. Ass'n., 157 S. W. (2d) 230 (Mo. Sup.); State v. Ball, 171 S. W. (2d) 787 (Mo. App.).

A further, less persuasive, indication of intent is indicated by the use of the word "shall" in the proviso, because

the word "shall," in a legislative enactment, ordinarily applies to something to be done or to take place in the future. *Minter v. Bradstreet*, 174 Mo. 489, 73 S. W. 668.

From the foregoing, we are of the opinion that the resolution authorized by the proviso in Section 29, Article III of the Constitution, fixing the effective date of laws previously passed, must be passed before the commencement of the recess.

In regard to the second question, attention is directed to Section 659, R. S. Mo. 1939, which section is as follows:

"A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted, subject to the following exceptions:

"(a) A law necessary for the immediate preservation of the public peace, health or safety, which emergency must be expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house, said vote to be taken by yeas and nays, and entered on the journal, or a law making an appropriation for the current expenses of the state government, for the maintenance of the state institutions or for the support of public schools, shall take effect as of the hour and minute of its approval by the governor; which hour and minute may be endorsed by the governor on the bill at the time of its approval.

"(b) In case the general assembly, as to a law not of the character hereinbefore specified, shall provide that such law shall take effect on a date in the future subsequent to the expiration of the period of ninety days hereinbefore mentioned, said

law shall take effect on the date thus fixed by the general assembly.

"(c) Laws not of the nature herein-before specified enacted by the general assembly at its regular session in 1939 and each ten-year period thereafter, and except as otherwise provided by law, the Revised Statutes of 1939 and each ten-year period thereafter, shall take effect on the first day of November in the year of their enactment or authorization: Provided, that unless suspended under the referendum or unless otherwise provided by law, laws changing the time of holding court shall take effect in ninety days after the adjournment of the session at which such laws may have been enacted."

This section of the statute is in conflict with Section 29 of Article III of our present Constitution and would ordinarily have no bearing upon the effective date of bills passed by the 63d General Assembly. However, the schedule of the new Constitution makes provision for existing statutes which are in conflict with the recently adopted Constitution. This provision is found in Section 2 of the Schedule, and is as follows:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Because of this portion of the Schedule of the Constitution, in determining the effective date of any bill enacted we must consider Section 659, supra, until July 1, 1946, or until this section is repealed.

May 22, 1945

Conclusion

From the foregoing, it is the conclusion of this Department that if the General Assembly contemplates a recess of a period of more than thirty days, the General Assembly, by a resolution passed before the commencement of the recess, may fix the effective date of bills enacted prior to the commencement of the recess at a time earlier than ninety days after the adjournment of the session. It cannot pass such a resolution at the time of reassembly after the termination of a recess. However, this does not apply at the present time because of the existence of Section 659, R. S. Mo. 1939, under the provisions of which section a law passed by the General Assembly shall take effect ninety days after the adjournment of the session at which it is enacted, except laws containing an emergency clause.

Respectfully submitted,

SMITH N. CROWE
Assistant Attorney General

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC/WOJ/EG

CONSTABLE AND OFFICERS: May constable qualify who failed to take the prescribed oath within the time provided by statute.

February 8, 1945

7/20



Mr. Paul J. Clay
Clerk of the County Court
St. Francois County
Farmington, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of February 5, which request reads as follows:

"We have a Constable in Pendleton Township, St. Francois County, who was duly elected to succeed himself, in the last General Election of 1944. He is now asking to qualify for this office. Please advise if this is proper or should he have qualified in the ten day period following the election last November. Thanks for your immediate attention to this inquiry."

The general rule regarding the time when an officer shall take an oath is laid down in Volume 42, American Jurisprudence, Section 125, page 972, which reads in part as follows:

"The time within which the officer may take the oath of office may be fixed by law, and it is usually provided that the oath shall be taken and subscribed before the officer enters upon the discharge of the duties of the office. Whether the oath may be taken after such time depends on the mandatory or directory character of the requirement. If mandatory, the officer must be sworn within the time allowed. * * * "

The Courts in this State have held that there is no universal rule in all circumstances for distinguishing between

directory provisions and mandatory provisions, but that the primary object is to ascertain the legislative intent and that those provisions that do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance, are directory. In so holding the Court said in *State ex rel. Ellis v. Brown*, 33 S.W. (2d) 104, 1.c. 107:

"! * * * There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory."

Section 11370, pages 325, 326 and 327, Laws 1941, provides constables shall hold their office until their successors are elected and qualified.

Section 13374, Revised Statutes 1939, provides the County Court shall appoint some person as constable when a vacancy exists.

Section 13371, Revised Statutes 1939, provides that every constable shall give a bond to the State within ten days after his election.

We are unable to find any statute which provides what the result shall be if certain conditions prior to the constable qualifying are not fulfilled.

Section 6, Article XIV, requires all officers, before entering upon official duties, to take and subscribe to an oath. A constable has been held to come within the provisions of this section of the Constitution. Section 6, Article XIV, reads as follows:

"All officers, both civil and military, under the authority of this State, shall, before entering on the duties of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office."

In *State v. Heath*, 132 S.W. (2d) 1001, 1.c. 1003, this Court quoted approvingly from former decisions holding that statutes fixing time when a school officer must qualify are, as a general rule, regarded as directory instead of mandatory, unless there is contained in the statute express provision to that effect. In so holding the court said:

" * * * This court has said: 'If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory.' *State ex inf. McAllister ex rel. Lincoln v. Bird*, 295 Mo. 344, 244 S.W. 938, 939. Likewise, it is said: 'Statutes fixing the time within which school officers must qualify are, as a general rule, regarded as directory to the extent that mere delay in qualifying within the time prescribed does not, of itself, cause a vacancy in the office, unless there is contained in the statute an express provision to that effect.' 56 C. J. 309, Sec. 182; see also 46 C. J. 962, Sec. 95; * * * ."

Also in *Schafly v. Baumann*, 108 S. E. (2d) 363, 1.c. 366, the Court said:

" * * * The general rule and its limitations, likewise recognized in the cited cases, are stated in 59 C. J. 1078, Sec. 634: 'A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation

February 8, 1945

of time must be considered a limitation on the power of the officer."

In the instant case, since the elected constable is succeeding himself in office and under the law it is the duty of the constable to hold said office until his successor is duly elected or appointed and qualified, apparently the newly elected constable is acting upon the theory that any duties performed subsequent to his being notified of his election to said office, and prior to his qualifying to said office, were performed in the capacity of constable holding office until his successor has been duly elected or appointed and qualified.

In view of the foregoing authorities holding that such statute is merely directory and not mandatory, and also in view of the fact there is no mandatory provision in the statute for forfeiture of his office or for appointing some one to replace him for failure to qualify within the ten day period, we conclude the constable-elect may now qualify by taking and subscribing to the oath.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

ARH:ml

STATE GEOLOGIST : Section 14892, R.S. Mo. 1939, not mandatory
POWER TO APPOINT AN : in requiring appointment of competent engi-
ENGINEER & ASSISTANTS.: neer and assistants. Such appointees when
: appointed are employees, not officers.
: District Engineer of the United States
: Geological Survey is eligible for such ap-
: pointment.

June 29, 1945

Honorable Edward L. Clark
State Geologist
Rolla, Missouri



Dear Mr. Clark:

Your letter of May 31, requesting an opinion respecting the effect of the provisions of Section 14892, Chapter 112, R. S. Mo. 1939, and respecting your power as State Geologist to appoint as an engineer in your work, a person who now holds an office of profit under the United States, has been received.

Your letter states:

"Chapter 112, Section 14892, Revised Statutes Missouri 1939, states, 'The state geologist, by and with the approval of the board of managers, shall appoint a competent engineer and such assistants as may be necessary to carry out the provisions of sections 14891 to 14893, inclusive.'

"I will appreciate an opinion from your office concerning whether or not this sentence directs the State Geologist to appoint a competent engineer, or whether it simply authorizes the State Geologist to appoint an engineer if such should be necessary.

"Will it be possible for me to designate Mr. Henry C. Beckman, District Engineer, Surface Water Brance of the U.S. Geological Survey as a competent engineer? The Missouri Geological Survey cooperates with the U. S. Geological Survey on a fifty-fifty basis for the collection of stream-flow data.

June 29, 1945

"Actually one-half of Mr. Beckman's salary is being paid by the State of Missouri, although he receives his pay from the Federal Government.

"I do not desire to employ an additional engineer if such policy is permissible and not in conflict with Section 14892."

The answer to your letter requires consideration of three propositions, to-wit: First, whether, under the terms of Section 14892, Chapter 112, R. S. Mo. 1939, the duty is mandatory or merely permissive and directory for the appointment of an engineer and assistants to carry out the provisions of Sections 14891, 14892 and 14893 of said Chapter by the State Geologist; and,

Second, whether, if the State Geologist, by and with the approval of the Board of Managers of the Bureau of Geology and Mines, does appoint an engineer, would the State Geologist, under the law, be empowered to appoint Honorable Henry C. Beckman, District Engineer, Surface Water Branch of the United States Geological Survey, as the competent engineer named in said Section 14892.

Third, whether, if and when such competent engineer and assistants named in said Section 14892, are appointed, they become officers or, are merely employees.

Said Section 14892, is as follows:

"The state geologist, by and with the approval of the board of managers, shall appoint a competent engineer and such assistants as may be necessary to carry out the provisions of sections 14891 to 14893, inclusive. The compensation of said engineer and assistants shall be determined by the board of managers upon recommendation of the state geologist who shall also have the power to remove appointees when deemed necessary for the good of the work."

June 29, 1945

Said Section 14892, along with the use of the word "shall" in directing the State Geologist, by and with the approval of the Board of Managers to appoint a competent engineer, further states that such engineer and assistants shall be appointed as "may" be necessary. The apparent legislative intent in enacting this Section along with the other Sections of said Chapter under consideration, was that the engineer and assistants should be appointed only if, as and when it may be necessary. The further language of said Section 14892, in providing that the State Geologist shall have the power to remove appointees when deemed necessary for the good of the work implies, at least, that if the work at hand did not require the appointees to remain in office they should be removed, and no appointments at all made if the work should be discontinued. We believe the word "shall" is directed to the appointment of a competent engineer, if one should be appointed at all, and is not to be construed as imposing a mandatory duty upon the State Geologist to make such appointment at all events. We do not believe the Section requires that the State Geologist must appoint an engineer unless the work would require it.

Sections 14891, 14892 and 14893 must all be read together to arrive at the intention of the Legislature in enacting this legislation on the subject named in Section 14891. Sections 14891 and 14893 are as follows:

"The board of managers of the bureau of geology and mines is hereby directed to make a survey of the water resources of the state, including the determination of water power, flood prevention, area of watersheds, underground water supply, chemical composition of waters, and to show locations where power can be generated, and the amount and character of lands that would be inundated by the erection of dams to secure water power. To do this, gauging stations shall be established and such surveying and other field work shall be done as may be deemed necessary. The chemist of the bureau shall make all necessary analyses to determine the character of the waters of streams and underground water supplies."

Section 14893:

"The work so far as possible shall be done in cooperation with the United

States geological survey and other government and state bureaus, and the progress attained shall be printed and reported to the 52nd general assembly; and if the work be continued, to succeeding general assemblies, in the biennial report of the state geologist."

Said Section 14891, it will be observed, states that the survey itself for which work an engineer and such assistants as would be necessary to carry out the work is to be determined as the necessity of the case would require.

Said Section 14893, provides, that the work "so far as possible" shall be done in cooperation with the United States Geological Survey, "and if the work be continued" it shall be reported to succeeding general assemblies.

Thus it will be seen that each of these Sections contains language and provisions which are addressed to the discretionary judgment and powers of the Board of Managers of the Bureau of Geology and Mines in relation to the activities and work proposed in the three sections as to what work may be necessary, who may do such work, and how long it may be continued in order to gather the information and facts desired as set forth in said Section 14891.

It would thus appear to have been the intention of the Legislature in enacting this legislation, to make the terms and provisions of these Sections, including the appointment of an engineer under said Section 14892, directory rather than mandatory.

Whether a statute is mandatory or directory is governed by the intention of the Legislature in passing such legislation. 59 C. J., page 1072, states this rule as follows:

"There is no universal rule or absolute test by which directory provisions in a statute may in all circumstances be distinguished from those which are mandatory, but in the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intent, * * * "

59 C.J. on page 1086, further treats of the rule of construction of statutes distinguishing mandatory and permissive language and discussing the meaning of such language, states:

"* * * Where a statute makes that legal and possible which otherwise there would be no authority to do, it will be construed as permissive only, although using the word 'shall'.
* * * So provisions regulating the duties of public officers, and specifying the time and mode of performing such duties, are generally construed as permissive, notwithstanding the use of the word 'shall', * * * "

The same work, 59 C. J., page 1074, further states the rule on the subject, as follows:

"* * * Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory,
* * * "

Our Supreme Court in the case of State ex rel. Ellis vs. Brown, 33 S. W. (2d) 104, on the question whether a statute is to be construed as mandatory or directory, l.c. 107, uses the following language:

"* * * There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the

legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished.
* * *

The Supreme Court of Missouri in the case of State vs. Bird, et al., 295 Mo. Rep. 344, again expressing its views on the construction of a statute as either mandatory or directory, l.c. 351, 352, said:

"Under a more general rule this construction may be sustained in that if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by the law. (State v. Cook, 14 Barb. 259.) By this we mean that if a fair consideration of the statute shows that unless the Legislature intended compliance with the proviso to be essential to the validity of the proceeding, which nowhere appears, then it is to be regarded as merely directory. * * *"

The evident intention of the Legislature in passing such legislation appears to have been that a competent engineer and such assistants as might be necessary to carry forward the work proposed under the terms of said Section 14892, should be employees rather than public officers.

Neither Section 14892 nor any other Section of Chapter

112, requires such competent engineer or assistants to take and subscribe to an oath, nor are such appointees required to give a bond.

The text writers and the Courts make a clear distinction between employees and officers in determining when a person is an "officer".

46 C. J. on this question, page 931, states:

"* * * On the other hand, that a person elected or appointed is not required to subscribe to an oath, or to give a bond, although not determinative of the question of the existence of an office, may be considered as indicating that it was not intended to create an office."

Our Supreme Court in the case of State ex rel. Cameron vs. Shannon, 133 Mo. 139, quoting a Michigan case, 1.c. 164, distinguishes between an employee and an officer in the following language, to-wit:

"* * * 'An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer. The officer is distinguished from the employee in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position.'
* * *"

The Court, on the same page of the same volume, further said:

"The fact that it is provided by ordinance that the superintendent of water-works shall hold his office for one year, give bond for the faithful performance of his duties, clearly shows that he is an officer, and because he may be removed at the pleasure of the board, and that he is paid as other city employees, does not show to the contrary, as such things are not inconsistent with his position as such officer."

In Volume 29, Words and Phrases, page 317, two New York cases are digested which hold that an engineer is merely an employee and not an officer. The digest of these cases indicated above, is as follows:

"A city engineer is an 'employee,' and not an 'officer,' of municipality, where no mandatory statute affecting municipality requires the appointment of a city engineer. *Wipfler v. Klebes*, 298 N.Y.S. 353, 357, 164 Misc. 220.

"An assistant engineer in the department of bridges of the city of New York is an 'employee' whose relation to the city is contractual and not an 'officer.' *La Chicotte v. City of New York*, 151 N.Y.S. 566, 569, 166 App. Div. 279."

We believe from a fair and reasonable consideration of the terms of said Section 14892, as read and construed with the terms and provisions of Sections 14891 and 14893, supra, the power given the State Geologist by and with the approval of the Board of Managers of the Bureau of Geology and Mines to appoint a competent engineer and assistants is directory rather than mandatory, and that when so appointed they become employees rather than officers.

The next matter to be considered grows out of your question whether it will be possible for you to designate

June 29, 1945

Mr. Henry C. Beckman, District Engineer, Surface Water Branch of the U. S. Geological Survey as a competent engineer.

We think you may so appoint this person as the competent engineer provided for in said Section 14892. Having heretofore in this opinion come to the conclusion that such competent engineer and assistants as may be appointed under the terms of said Section 14892, are merely employees and not officers, the person whom you mentioned, Mr. Henry C. Beckman, would be eligible for such employment or "appointment" as an engineer in performing such services in making surveys and the performance of such acts as might be required in carrying out the provisions of said Sections 14891, 14892 and 14893, for the Bureau of Geology and Mines of the State of Missouri.

Section 9, Article VII, of the New Constitution of Missouri, recently adopted, states:

"No person holding an office of profit under the United States shall hold any office of profit in this state, members of the organized militia or of the reserve corps excepted."

The fact that Mr. Henry C. Beckman may hold an office of profit under the United States would not render him ineligible to become an employee of the Bureau of Geology and Mines of the State of Missouri, by appointment by the State Geologist as a competent engineer to carry forward the work of said Bureau, under the terms of said Section 14892. He would not become an officer of profit in the State of Missouri by such appointment, and therefore, his appointment or employment would not violate the provisions of said Section 9, Article VII, supra, of the Constitution of Missouri.

CONCLUSION.

It is, therefore, the opinion of this Department that that part of Section 14892, supra, quoted in your letter is not mandatory in requiring the State Geologist to appoint a competent engineer, but merely vest in him permissive authority to appoint such engineer and assistants if and when such may be necessary, and,

June 29, 1945

Second, that if and when such competent engineer and his assistants may be appointed by the State Geologist under the terms of said Section 14892, they would become employees and are not officers. Such appointment would not create an office of profit in this State, and

Third, the fact that Mr. Henry C. Beckman may be holding the office of District Engineer, Surface Water Branch of the United States Geological Survey, and receives a part of his salary from the United States Government would not prevent his appointment as a competent engineer, under the terms of said Section 14892. He would thereby become only an employee of the Bureau of Geology and Mines of the State of Missouri, and as such, his appointment would not conflict with the Constitution or Laws of the State of Missouri.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

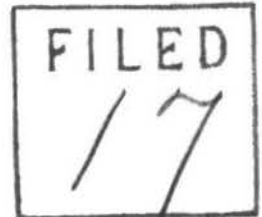
APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

COUNTY COLLECTORS: Regarding the purchase of tax receipt books
by county collector.

August 1, 1945



Honorable Jonathan E. Clarke
Prosecuting Attorney
Lincoln County
Elsberry, Missouri

Dear Mr. Clarke:

On July 11, 1945, you wrote a letter to this office
requesting an opinion, which letter reads as follows:

"The Collector of Revenue of this County
has been asked by a local Drainage Dis-
trict to pay out of his statutory fee for
collecting drainage taxes the cost of
printing Receipt Books which are completed
by him and delivered to the tax payer.

"The Collector feels that his statutory
fee for collecting Drainage Taxes is not
sufficient to justify the purchase of
these Tax Receipt Books, particularly in
view of the fact that in the past the
drainage districts themselves have pur-
chased these Receipts. The Collector
would like a ruling on this matter, and
any information you have in the premises
will be greatly appreciated."

We direct your attention to the following sections of
the Revised Statutes of Missouri, 1939.

Section 12370 reads, in part, as follows:

"To maintain and preserve the ditches,
drains, levees or other improvements made

August 1, 1945

pursuant to this article and to strengthen, repair and restore the same, when needed, and for the purpose of defraying the current expenses of the district, the board of supervisors may, upon the completion of said improvements and on or before the first day of September in each year thereafter, levy a tax upon each tract or parcel of land upon corporate property within the district to be known as a maintenance tax.' * * * Said collector shall demand and collect the maintenance tax and make return thereof and shall receive the same compensation therefor and be liable for the same penalties for failure or neglect so to do as is provided herein for the annual installment tax: * * * "

Section 12342 reads, in part, as follows:

"It shall be the duty of the collector of revenue of each county in which lands or other property of any drainage district organized under this article are situate to receive the 'drainage tax book' each year, and he is hereby empowered and it shall be his duty to promptly and faithfully collect the tax therein set out and to exercise all due diligence in so doing. He is further directed and ordered to demand and collect such taxes at the same time that he demands and collects state and county taxes due on the same lands and other properties. Where any tract or part thereof has been divided and sold or transferred, the collector shall receive taxes on any part of any tract, piece or parcel of land or other property, charged with such taxes and give his receipt accordingly. * * * "

Section 11084 reads, in part, as follows:

"Whenever any person shall pay taxes charged on the tax book, the collector

August 1, 1945

shall enter such payment in his list, and give the person paying the same a receipt, specifying the name of the person for whom paid, the amount paid, what year paid for, and the property and value thereof on which the same was paid, according to its description on the collector's list, in whole or in part, as the case may be, and the collector shall enter 'paid' against each tract or lot of land when he collects the tax thereon.
* * * "

Section 11106 reads, in part, as follows:

" * * * Provided, that the limitation on the amount to be retained as herein provided shall apply to fees and commissions on current taxes, but shall not apply to commissions on the collection of back and delinquent taxes and ditch and levee taxes, and the compensation of the county collector for the collection of levee taxes and ditch taxes, collected for drainage purposes, shall be one per cent of the amount collected."

It will be noticed that there is no provision in any of the above statutes which expressly allows the county collector to receive any compensation or fees for the expenses of collecting drainage district taxes. Section 11106 allows a certain fee for collection of drainage district taxes, but does not authorize any additional amounts for the payment of necessary expenses of the collector or authorize the collector to charge any additional fees for such collection. Section 12370, providing for a maintenance tax, states that the tax may be levied, in part, "for the purpose of defraying the current expenses of the district." No cases have been found which determine whether tax receipt books of the county collector would be considered current expenses of the district. However, the question of expenses has been considered by the Missouri Supreme Court in several instances.

In *Ewing v. Vernon County*, (1909) 216 Mo. 681, the question arose as to whether a county recorder was entitled to reimbursement for stamps which were used by him in his official business. The court held that he was entitled to reimburse-

August 1, 1945

ment for this item. There were no express fees allowed for the business which he transacted which necessitated the use of the stamps in question. The court said:

"Conceding there are no fees allowed for the delivery of a deed after recording or for transmitting a deed from one county to another, yet the statute does not contemplate that he should pay money out of his pocket in the performance of his official duty."

The court, in answer to the contention that the salary of a public officer cannot be increased and that he cannot receive additional compensation for his duties, said:

"Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo."

The court further said:

"The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'"

August 1, 1945

Rinehart v. Howell County, (1941) 348 Mo. 421, was an action against the county for reimbursement for sums paid for necessary stenographic work incurred by the prosecuting attorney of the county in the discharge of his official duties. That case cited with approval the Ewing case, supra, and again stated:

"The case is to be distinguished from cases announcing the rule that officials may not receive compensation in addition to that authorized by law." (Cases cited.)

The court further said:

"The instant case was submitted on the theory, as disclosed by the stipulated facts and undisputed testimony, that the outlays, as contradistinguished from income, were bona fide, reasonable and actual expenditures for indispensable expenses of the office by respondent (not on the theory that compensation to an officer was involved) and falls within the ruling in Ewing v. Vernon County, 216 Mo. 681, 695, 116 S. W. 518, 522(b). That case quoted with approval (383) a passage from 23 Am. and Eng. Ency. Law (2 Ed.) 388, to the effect that prohibitions against increasing the compensation of officers do not apply to expenses for fuel, clerk hire, stationery, lights and other office accessories and held a recorder entitled to reimbursement for outlays for necessary janitor service and stamps, stating: 'Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore, those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo.'"

August 1, 1945

We think it is apparent from these cases that a public officer is entitled to reimbursement for expenses which are necessary in the performance of his official duties, and that this type of expense is not within the rule against the receipt of additional compensation by a public officer so as to deny him the right to reimbursement. There can be no doubt that the securing of tax receipt books is necessary to the collector in collecting the drainage district taxes here in question, since he is required by Section 11084, quoted above, to give each taxpayer a receipt upon the collection of the tax. It is thus mandatory on the collector that he give such a receipt.

As stated above, Section 12370 authorizes taxation, in part, for the purpose of defraying current expenses of the district. While this does not specify that tax receipt books shall be paid for by the district, we think, in view of the above cases and the fact that the giving of a receipt is a mandatory duty of the collector, that the expense of the receipt books would be considered current expenses of the district.

It is interesting to note that in Section 11106, which provides for the fees to be allowed county collectors for the collection of taxes, it is provided, under subsection 14, relating to the fees of the collector in counties where such taxes exceed two million dollars a year, the collector must pay all salaries and other expenses of his office. The provision that the collector shall do this is significantly absent from the provisions relating to fees of collectors in any other counties. Since it has been the custom for counties to pay such expenses of county officials, we think it indicates that they considered it proper to do this except where the statute provided otherwise.

It has been necessary, because of the lack of any authority on the subject which directly involves drainage district fees, to look to the cases involving the collection of other taxes and the expenses of county officials in regard thereto. We think, however, that the rules pertaining to these situations are applicable to the instant question, since the only difference between the two is that in one case the drainage district is involved and would be liable for the costs, and in the other case the county would be liable.

August 1, 1945

CONCLUSION

It is, therefore, the opinion of this department that the County Collector of Lincoln County would not be required to pay out of his statutory fee for collecting drainage taxes the cost of printing receipt books which are completed by him and delivered to the taxpayer.

Respectfully submitted,

SMITH N. CROWE, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:HR

BUILDING FUND OF CONSOLIDATED
SCHOOL DISTRICT:

1. Can Building Fund be transferred to Incidental Fund.
2. If such fund is so transferred, would the County Treasurer be protected, etc., by warrant of Board of Education.

*See op. to Hubbard
June 30, 1948
- Same question -*

October 18, 1945



Honorable Joe W. Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Sir:

I. Your letter to the Honorable J. E. Taylor, Attorney General of Missouri, Jefferson City, Missouri, which is as follows:

"We have in our county a consolidated school district in which was a number of school buildings, which before the consolidation belonged to other districts.

These buildings were not used for the reason the students attend the consolidated school so they were sold, and the money placed in the building fund.

Would it be legal for the consolidated district to check on this building fund to pay for items ordinarily paid out of the incidental fund?

If the consolidated district would draw a warrant on the building fund, transferring the money received from the sale of these buildings, into the incidental fund would the warrant be sufficient evidence to protect the county treasurer and would the transfer be proper."

has been received and was forwarded to this department for consideration, answer and opinion.

II. Please be advised, -

(A) That Section 10471, R. S. Mo., 1939, provides in part, as follows:

"* * * whenever there is within the district any school property that is no longer required for the use of the district, the board is hereby authorized

to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

(B) Section 10366, p. 893, Laws of Missouri, 1943, provides in parts, as follows:

(1)"All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received. There is hereby created the following funds for the accounting of all school moneys: Teachers' Fund, Incidental Fund, Free Textbook Fund, Building Fund, Sinking Fund, and Interest Fund. School district moneys shall be disbursed only through warrants drawn by order of the board of education. Each warrant * * shall specify the amount to be paid; * * for what purpose * * *. No warrant shall be drawn for the payment of any school district indebtedness unless there is sufficient money * * *."

"The warrants drawn shall be in the following forms."

Here is set out in the section, different warrants for various funds, including the Building Fund, which is as follows:

BUILDING FUND

\$ No

Treasurer ofCounty, Missouri:

Pay to , or order, the sum of . . . dollars, for . . . furnished in the repair, furnishing or erection of a school-house in district No. . . . , out of any moneys in your hands belonging to the building fund of said district.

Done by order of the board, this . . . day of . . . , 19
, President., Clerk."

(2) " * * * All money derived from taxation or received from the state for the erection of school buildings, from sale of school sites, schoolhouse or school furniture, from insurance, from sale of bonds, shall be placed to the credit of the 'Building Fund'. * * *"

(3) " * * * No treasurer shall honor any warrant unless it be in the proper form, and each and every warrant shall be paid from its appropriate fund, as provided by law. * * *"

(4) " * * * Provided further, that the Board of Directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property: Provided further, that after all incidental obligations are paid, the board of directors shall have the power to transfer such portion of the balance remaining in the Incidental Fund to the Teachers' Fund as may be necessary. * * *"

III. (A) In *Crow vs. Consolidated School District No. 7*, 36, S. W. (2nd), 676, the court held, as follows:

(1) "Power of board of consolidated school district to establish schools necessarily carries with it power to abandon other schools no longer required."

(B) In *Corley vs. Montgomery*, 46, S. W. (2nd) 283, the court held, as follows:

(1) "In absence of positive statute to contrary, board of city school district impliedly has discretionary power to discontinue use of any property not being required."

IV. (A) In *Consolidated School Dist. No. 6, of Jackson County vs. Shawhan*, 273 S. W., 182, the court held, as follows:

(1) "Powers of board of directors of school district are limited to those expressly delegated, in respect to application of separate funds, directors are personally liable for misapplication of moneys in teachers' fund to purposes other than payment of teachers."

(2) "Where teachers in school district still have claim against district for part salary, school district is entitled to recover against directors for misappropriation of teachers' fund, although district has never been called on to pay balance."

(3) "Directors of school district are liable for misapplication of teachers' fund to purposes other than payment of teachers, notwithstanding it was done in good faith and without willful intention."

(B) In School District No. 45 of Pemiscot County vs. Correll, 286 S. W., 136, the court held, as follows:

(1) "Action against county treasurer, who has not given bond, required by Rev. St. 1919, Sec. 11188, to recover school district funds, illegally paid out, may be maintained, though no warrant has been drawn, presented, and refused, and though treasurer's term has not expired."

(2) "School district, a body corporate, under Rev. St. 1919, Sec. 11197, has capacity to sue county treasurer to recover school funds illegally paid out."

(3) "Established illegal practice of permitting clerk of school board to sign president's name to warrants held not to estop school district from asserting claim against county treasurer for money illegally paid out on warrants so drawn, in view of Rev. St. 1919, Secs. 11222, 11223."

V. It would seem that the board acted wisely in the selling of the abandoned school property and placing the proceeds of the sale or sales, in the Building Fund of the School District.

VI. From the foregoing quotations of the law and court decisions, I am unable to find any delegated authority, that the School Board has power to transfer Building Fund to any other fund or funds.

October 18, 1945

VII. However, it seems from the provisions of the law that it is possible to transfer Incidental Funds to almost any other fund or funds, which is probably why the Legislature did not delegate power to the board to transfer Building Fund to Incidental Fund.

CONCLUSION

VIII. Therefore, it is the opinion of this department that a School Board of a Consolidated School District has no authority to transfer the Building Fund to the Incidental Fund, and if a Board of Education should attempt to do so, the fund would not be transferred, and the County Treasurer paying out Building Fund for any purpose not enumerated in the law, even though allegedly transferred to the Incidental Fund, would constitute an illegal act, and would be liable personally and on his bond, for such misappropriation or conversion.

Respectfully submitted,

HARRY J. SALSBURY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney-General

HJS:DC

SCHOOL FUND LOANS: Applicability of Sec. 7, Art. IX, Constitution of 1945 to outstanding county school fund loans and to disposition to be made of fines and forfeitures.



October 22, 1945

Mr. Edgar S. Clatterbuck
County Treasurer
Fulton, Missouri

Dear Sir:

Reference is made to your letter of October 18, 1945, requesting an official opinion of this office, and reading as follows:

"On page 56, Sec. 7 of the Proposed Constitution of the State of Missouri states that all loans shall be liquidated without extension of time, is it that they must be collected by the 1st of June 1946? Our Judges were under the impression that they would not be forced to collect loans until they became due, but they could not renew any loan.

"Do I understand that all fines will be apportioned as Interest instead of being placed to the Capital School principal, and at what date I will be expected to make the change?"

With reference to the question propounded in the first paragraph of your letter of inquiry, we direct your attention to an official opinion of this department delivered under date of March 19, 1945, to the Honorable G. R. Chamberlin, Prosecuting Attorney, Harrisonville, Missouri. We believe that it will serve to answer your inquiry completely, and enclose a copy of such opinion herewith.

With reference to the inquiry contained in the second paragraph of your letter, we direct your attention to a por-

tion of Section 7, Article IX, Constitution of 1945, reading as follows:

" * * * All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the State, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law."
(Emphasis ours.)

Here, clearly, is direct provision for the annual distribution of the proceeds of penalties, forfeitures and fines, and in the same manner as interest accruing from investment of the county school fund. It will, of course, require action by the General Assembly to provide such method of distribution, in view of the incorporation in the constitutional provision of the direction that such distribution shall be made "according to law." Such affirmative action on the part of the General Assembly has not as yet been had.

However, there is now existent a statute, found in Laws of 1943, at page 880, being an amendment of Section 10376, R. S. Mo. 1939, which reads, in part, as follows:

" * * * also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

Examination of the quoted portion of this statute with the quoted portion of Section 7, Article IX, of the Constitution of 1945 discloses that an inconsistency exists between the

two. Such inconsistency arises by virtue of the fact that under the statute only the income derived from the investment of such penalties, forfeitures and fines shall be distributed, whereas under the constitutional provision the entire proceeds of such penalties, forfeitures and fines shall be distributed annually, as may be provided by law.

In the premises, we believe the provisions of Section 2 of the Schedule appended to the Constitution of 1945 to be pertinent. Said Section 2 reads, in part, as follows:

"* * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

This portion of the Schedule has the effect of keeping in force the provisions of Section 10376, R. S. Mo. 1939, as amended, Laws of Missouri, 1943, page 880, until either July 1, 1946, or until such time as said section be repealed or amended to conform with the Constitution of 1945 by action of the General Assembly, whichever shall occur earlier in point of time. The records of the General Assembly do not disclose such action having been taken as yet.

CONCLUSION

In the premises, we are of the opinion that Section 7, Article IX, of the Constitution of 1945 does not require the immediate liquidation of outstanding county school fund loans, and that such action will necessarily be taken only when such loans become due subsequent to the effective date of this portion of the Constitution of 1945; and we are further of the opinion that all matters relating to the collection and preservation of present county school fund loans will be governed by the existing statutes relating thereto until July 1, 1946, unless such statutes be sooner repealed or amended by act of the Legislature.

We are further of the opinion that only the income derived from the investment of proceeds of penalties, forfeitures

Mr. Edgar S. Clatterbuck

-4-

October 22, 1945

and fines shall be distributed annually, under the provisions of Section 10376, R. S. Mo. 1939, as amended, Laws of 1943, page 880, until July 1, 1946, unless said section be repealed or amended to conform with the Constitution of 1945 at a time prior to July 1, 1946.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

PROSECUTING ATTORNEYS.

Prosecuting Attorneys entitled to receive compensation for office while legally holding title thereto.

1945
January 3, 1944

1/16



Honorable C. E. Cobb
County Clerk, Wayne County
Greenville, Missouri

Dear Mr. Cobb:

Under date of October 25, 1944, you wrote to this office requesting an opinion as follows:

"Will you please honor the County Court of Wayne County, Missouri, with your official opinion on the following subject matter?

"The Prosecuting Attorney of Wayne County, Missouri, has left his office and volunteered into the Armed Forces of the U. S. Army, there is no Deputy left in charge, only occasionally a Stenographer in the office, he continues to bill the county for the amount of his monthly salary; Is it legal for the county to pay his salary when the work is going undone, and no legal representative in the office.

"The above favor is being asked by Order of the County Court of Wayne County, Missouri."

The compensation or salary of any officer is a matter which is covered by statute. Absent statutory provision authorizing the payment of compensation to an officer he can draw no compensation.

Section 12939 R. S. Mo., 1939, provides for the payment of compensation to Prosecuting Attorneys. This Section is not quoted herein because it is known and contains a great deal of matter not pertinent to your question.

The rule has long been established in Missouri that the person who holds the title to the office is entitled to the emoluments and all of the incidents pertaining to the office. In the early case of State of Missouri ex rel. Vail v. Clark, State Auditor, 52 Mo. p.508 a question was

raised as to a ~~precedent of the~~ payment of salary to a judge while a quo warranto proceeding was pending. The following brief quotation is taken from l. c. 512:

"* * * The commission issued to the relator invested him with the title, and is prima facie evidence of his right to the office. It gave him the possession and the power to exercise its functions, of which he could be deprived only on due process, in the manner prescribed by law. State ex rel. Vail vs. Draper, 48 Mo., 213. He alone is entitled to the emoluments of the office, until the State, by a proper proceeding, has revoked the authority with which it has invested him. Meanwhile the auditor cannot rightfully withhold the salary.* * *"

The same rule is also stated in the case of State ex rel. Chapman v. Walbridge, 153 Mo., 194. This case involved the payment of salary to a patrolman in the City of St. Louis who had been improperly ousted from his office. The Supreme Court in discussing his right to recover compensation incident to the office, state the rule as follows in l. c. 203:

"The legal right to the office carried with it the right to the salary. The board by its wrongful act could not deprive him of this legal right. The right of a public officer to the salary of his office, is a right created by law, is incident to the office, and not the creature of contract, nor dependent upon the fact or value of services actually rendered. (Givens v. Daviess Co., 107 Mo. 603; Gammon V. Lafayette Co., 76 Mo. 675; State ex rel. v. Carr, 3 Mo. App. 6; State ex rel. v. Brown, 146 Mo. 401; Fitzsimmons v. Brooklyn, 102 N. Y. 536; Andrews v. Portland, 79 Maine, 484; Memphis v. Woodward, 12 Heiskell, 499; People ex rel. v. Smyth, 28 Cal. 21; Carroll v. Siebenthaler, 37 Cal. 193; Koontz v. Franklin Co., 76 Pa. St. 154; Walker v. Cook, 129 Mass. 579; Hoke v. Henderson, 4 Dev. (N. C.) 1; City Council

v. Sweeney, 41 Ga. 463; People ex rel. v. Brennan, 30 How. Prac. Rep. 417.) Hence, the fact that the relator after he was wrongfully and without warrant of law discharged from his position as policeman, and was thereby and thereafter prevented from discharging the duties of that position, and did not in fact discharge those duties or offer to do so, affords no ground for denying him his salary, and the court committed no error in awarding him a mandamus therefor.* * *"

In the later case of Coleman v. Kansas City, 351 Mo., 254, the following is at l. c. 267:

"* * * During the time Murray held the office, he is entitled to the salary fixed by law as an incident to that office. 'Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount of value of services performed, but is incidental to the office.' State ex rel. Evans v. Gordon, 245 Mo. 12, l. c. 27, 149 S. W. 638. Also, see State ex rel. Chapman v. Walbridge, 153 Mo. 194, 54 S. W. 447; State ex rel. Vail v. Clark, 52 Mo. 508. * * *"

In none of these cases is found a set of facts identical with the facts stated in your letter.

The Prosecuting Attorney of the county, by his entrance into the Armed Forces of the United States did not forfeit his office.

State ex inf. McKittrick v. Wilson, 166 S. W. (2d) 499, l. c. 501:

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service.* * *"

Search has been made of all the statutes relating to the compensation of Prosecuting Attorneys and

Hon. C. E. Cobb

-4-

Jan. 3, '45

we have been unable to find any statute which would authorize the refusal to pay the compensation of a Prosecuting Attorney while he holds title to the office and has not been suspended.

CONCLUSION.

Therefore, the conclusion from the foregoing authorities is that the salary for the office of Prosecuting Attorney is to be paid to the person holding the legal title to the office to the expiration of his term unless he is suspended or ousted from office by a decree of a court of competent jurisdiction before the expiration of his term.

Respectfully submitted

W. O. JACKSON
Assistant Attorney General

APPROVED:

VANE C. THURLO
Acting Attorney General

WOJ:LeC

JUVENILE COURT: Deputy probation officers in Jackson County may receive not to exceed \$3,000.00 per annum; Clerks and stenographers may receive not less than \$1500.00 nor more than \$2400.00 per annum; all of said salaries to be set by the Circuit Court.

August 20, 1945



Hon. Ray G. Cowan
Judge of the Circuit Court
Kansas City, Missouri

Dear Judge Cowan:

We have your letter of the 11th which reads as follows:

"I am having some dispute as to the interpretation of Section 9683, Special Laws of Missouri, of 1943, on Page 350, pertaining to the salaries of probation officers, deputies, clerks, and stenographers. Jackson County would come under the heading of 'Population of Counties 400,000 to 600,000 Inhabitants.'

I should appreciate your interpretation of this section as to the amount of salary the Juvenile Court is able to pay to deputy probation officers; also, the salary that can be paid clerks and stenographers under this section."

Section 9683, P 350, Laws of Missouri 1943, in so far as it pertains to the salaries inquired about in your letter reads as follows:

"* * * * Each deputy probation officer shall receive such salary as may be prescribed by the circuit court or the criminal court when constituted as a juvenile court under this article, not to exceed two thousand dollars per annum in counties of 600,000 inhabitants and over; Provided, the supervising officer assigned to courts of domestic relations may receive not to exceed three thousand dollars per annum; not to exceed three thousand dollars per annum in counties of 400,000 and less than 600,000 inhabitants; not to exceed two thousand dollars per annum in counties of 200,000 and less than 400,000 inhabitants; not exceeding twelve hundred dollars per annum in counties of 90,000 and less than 200,000 inhabitants; not exceeding eight hundred dollars per annum in counties of 50,000 but less than 90,000 inhabitants. In all counties

having a population of over 400,000 and less than 600,000 inhabitants, the circuit court or the criminal court when constituted as a juvenile court under this article, may appoint necessary clerks and stenographers who shall receive a salary of not less than fifteen hundred dollars nor more than twenty-four hundred dollars per annum. The salaries of the probation officer and his deputies, and clerks and stenographers appointed under this section, shall be payable monthly out of the funds of the county. Actual disbursements for necessary expense, exclusive of office expenses, made by probation officers while in the performance of their duties, shall be reimbursed to them out of the county funds after approval by the judge of the juvenile court; but no officer shall be allowed for such disbursements a greater sum than two hundred dollars in any one year."

We do not see where there is any ambiguity in the foregoing statute. Where there is no ambiguity in the language of a statute, there is no place for interpretation. In *St. Louis Amusement Company vs. St. Louis County*, 147 S.W. (2) 667, 669, the Court in passing upon a statute said:

"We need not conjecture as to the intent of the legislature in creating this exemption because we find the language of the statute is plain. And where the language of a statute is plain and unambiguous it may not be construed. It must be given effect as written."

In *St. Louis etc. vs. Unemployment Compensation Commission* 159 S.W. (2) 249, 250, the Supreme Court in discussing a statute said:

"Where there is no ambiguity there is no need for either a liberal or strict construction."

The language of Section 9683, *supra*, seems very plain as to the salaries inquired about in your letter. It provides that in counties of 400,000 to 600,000 population each deputy probation officer shall receive such salary as may be prescribed by the Court which is the Juvenile Court in that county, not to exceed \$3,000.00 per annum. The amount of the salary for such officer in the different classes of counties was a matter for the legislature to determine,

August 20, 1945

and when it clearly and plainly stated what the salaries should be, the question is settled.

Likewise, said section clearly provides a minimum and maximum salary for clerks and stenographers in counties of 400,000 to 600,000. Said section provides that the salaries of such clerks and stenographers shall not be less than \$1500.00 nor more than \$2400.00 per year. There is no ambiguity in the language of said statute with respect to the compensation of clerks and stenographers appointed by the Juvenile Court, and hence no room for interpretation of the statute.

CONCLUSION

It is, therefore, the opinion of this office (1) that in Jackson County each deputy probation officer may receive such salary as the Circuit Court may prescribe, not to exceed \$3,000.00 per year; (2) and that in Jackson County clerks and stenographers appointed by the Circuit Court to assist in the juvenile branch of said court may receive such salaries as the Circuit Court may prescribe between a minimum of \$1500.00 and a maximum of \$2400.00 per annum.

Yours very truly,

HARRY H. KAY
Assistant Attorney General

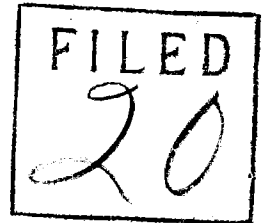
APPROVED:

J. E. TAYLOR
Attorney General

HHK:CP

PROBATE COURT: Regular term in session ends upon death of the Judge.

January 24, 1945



Honorable Herbert J. Crosby
Probate Judge
Troy, Missouri

Dear Sir:

This department has your letter of January 2, 1945, requesting an opinion concerning your authority to hold Court prior to your next regular term incident to your appointment to succeed Judge Martin upon his death. Your letter states:

"Your writer has recently been appointed Probate Judge of Lincoln County, Missouri, to fill out the unexpired Term of Judge William C. Martin, now deceased.

"I am interested to have an opinion from your office concerning Section 2448, Revised Statutes of Missouri, 1939, as to whether or not I am entitled under said Section, or for that matter any other Section of our Statutes, to have the County Court to furnish a stenographer or rather pay for the costs of a stenographer in connection with the operation of my office, and if so, is it the duty of the County Court to pay the prevailing price that competent stenographers are receiving in this community?

"I am also interested in having an opinion from your office as to whether or not, upon my appointment by the Governor to the office of Probate Judge, that I have authority to proceed with the ordinary business of the office from date of appointment or does the death of the Probate Judge, William C. Martin, ipso facto, stop all proceedings in Court such as making orders, until the next Term of the Probate Court, which is the 2nd Monday in February, 1945. I might add that

Judge Martin did not close his November Term before his death, and it has been his practice to keep his Term open from Term to Term."

There is an opinion being written in the office, regarding the duties of the County Courts of the State to pay for the services of a stenographer for Probate Judges of the State. When this opinion is approved and promulgated, a copy will be sent you.

Section 34 of Article VI of the Constitution of this State provides that the General Assembly shall establish in every county a Probate Court which shall be a court of record.

Section 35 of the same Article of the Constitution, provides that Probate Courts shall be uniform in their organization, jurisdiction, duties and practice, * * *.

The Constitution thus prescribing that Probate Courts should be uniform in their practice and procedure caused the Legislature to enact Section 2441, Article 11, Chapter 10, R.S. Mo. 1939, which is as follows:

"Said court shall hold four terms annually, commencing on the second Mondays of February, May, August and November and may hold special and adjourned terms at any time when required:
* * *"

There is much text authority and many decisions of the highest Courts in many States of the Union holding generally that when a Court of Record is convened at the beginning of a regular term it continues, unless it is adjourned until the opening day of the next regular term of such Court, and that the failure to adjourn during the term to a specific date does not end the term. In 15 C.J., page 881, in Section 231, it is stated:

"A term continues until it is adjourned or until it expires according to the time established by law. * * *"

The same Section at the same page, and on page 882, further states:

"Where the time of beginning but not of ending a term is fixed, the term, when it has been duly begun, will continue, and may for all general purposes be considered as in session, until

it has been determined by some affirmative judicial act, such as an adjournment sine die, or until the next term, and after the term of a court has been opened, the questions how long it shall remain open, to what day it shall be adjourned, and whether and how often it shall remain open for incidental business after the regular business of the term has been concluded are matters which rest in the discretion of the judge, * * *

But such text and the cases cited in the notes thereto all seem to be treating of a condition where the Judge would still be living, and do not cover such a case as the instant case where the former regular Judge is deceased. You state in your letter that:

"Judge Martin did not close his November Term before his death, and it has been his practice to keep his Term open from Term to Term."

The writer has found no case in Missouri where the question of the death of a Judge was involved on the matter of the duration of a term of Court. Corpus Juris on page 883, in a sub-paragraph of Section 231, states:

"The death of the regular judge does not end the term where his successor qualifies on the same day, and a Fortiori the death of such judge during a term held by a special judge previously selected does not end such term."

This statement under note 47 cites the case of Franklin v. Vandervoort, 50 W. Va. 412, 40 SE 374. In that case the regular Judge was ill. The Attorneys of the Bar under a Statute in the State of West Virginia permitting them so to do, elected a Special Judge to transact the business of the Court. The Special Judge assumed the bench and was occupying the bench and Court was in open session on the day of the death of the regular Judge. The Governor of that State on that day appointed the person who was acting as Special Judge to fill the unexpired term of the regular Judge while the said Special Judge was actually holding Court. That, it appears, could very well be the case and supply the text of Corpus Juris above quoted, because the Court was kept alive and in session by the terms of the Statutes, by the election of a Special Judge. The Court never ceased to function for want of a Judge. Reasoning the matter it would seem that the converse of the text just cited from Corpus Juris would be that if a new Judge did not qualify on the day of the death of the regular Judge, and while Court actually was being conducted in open session, that the term of Court would end upon the death of the Judge.

January 24, 1945

In the case of State ex rel. Smith vs. Coleman, 182 Mo. App. Rep. 358, it is decided that when a Judge of a Court of Record (in that case, a Circuit Judge) left the bench without formal adjournment or closing of his Court and intending not to return, that this constituted an ending of his term. The question in that case came up on the point of the timeliness of a motion for a new trial filed in the case pending before that Court. It seems it had been the custom of the Judge to leave his Court, as he thought, in session for the accommodation of litigants and lawyers to file belated motions after the Judge would depart for his home, he not intending to return. He did not return in that instance. After his departure the motion for new trial which constituted the basis for the appeal was filed. The Kansas City Court of Appeals in an opinion by Judge Trimble held that the term of Court ended when the Judge left not intending to return and that the motion for new trial was filed out of time. The heart of that case is that where there is no Judge there is no Court. The case cites and quotes from North Carolina cases and other cases from other jurisdictions. In holding that when the Judge left the bench the term ended, in the above cited Coleman case, l.c. 362, it is said:

"Defendant does not controvert the foregoing proposition. His contention is over the question whether or not the February term was adjourned or had come to an end at the time the motion for new trial was filed.

"Under the admitted facts it must be said that the court had adjourned and the term had come to an end. Any other view would tend to the introduction of abuses, would give rise to distrust and confusion, would rob judgments and court records of their certainty and finality, and open the door to irregularities of many sorts. It is difficult to conceive of a court being in session and transacting business with no judge thereof present to preside over and give expression to its orders. Whether a court is adjourned or not depends upon the actual facts and conditions and not upon whether a formal order that effect has been made. We do not mean to say that every time a judge momentarily or temporarily leaves the bench there is an adjournment. But when, as in this case, the judge has held a term of court and has transacted business and has left the place and jurisdiction of the court and departed to his home with no intention of returning such act constitutes an adjournment for the term the same as if a verbal order and

January 24, 1945

proclamation to that effect had been made. In defining the meaning of adjournment, the Supreme Court of Wisconsin, in French v. Higgins, 45 N.W. 817, held it to mean that situation where the judge not only ceases to exercise his functions for the time being but leaves the place of trial and the officers separate so that there remains no court at such place. If that result is accomplished it is an adjournment no matter whether an order or proclamation to that effect was made or not. In Boyd v. Teague, 16 S.W. 338, the Supreme Court of North Carolina says 'the term expires when, the business being dispatched, the judge adjourns court or leaves . . . The term of court is held by the judge and there can be none after he leaves.' In Delafield v. Lewis Mercer Const. Co., 20 S.E. 167 the same court, in speaking of the idea that the term of the court extended beyond the time of the judge's departure, says: 'This idea of a court in session without a judge is not warranted by law.' In that case the trial judge, upon leaving, directed that the court should remain open after he left. But the Supreme Court held that the court could not be constructively open after the judge had left. And it also held that even if the judge omitted to make a formal order of adjournment or directed that court should be held open' still there was an actual adjournment when he leaves the bench for the term. There is no court when there is no judge to hold it, and there can be constructive session after he has left.'"

In the same case, l.c. 364, it is further said:

"* * * The necessity for the personal attendance and presence of the judge at the place of meeting in order for the tribunal so meeting to constitute a court is recognized by our statutes which provide that if court shall not be held on the first day of the term, such court shall stand adjourned from day to day until the evening of the third day, and if, at any time after the commencement of a term, it happen that the court shall not be held according to its adjournment, it shall stand adjourned from day to day until the evening of the third day. If during that time the regular judge appear, or if in the proper manner a special judge is elected, then there is a court at which business may be transacted, but if not, there is no court at that term.* *"

The Coleman case cites the case of State ex rel. Klotz v. Ross et al. 113 Mo. 23. This is a case where a special Judge was elected to hold Circuit Court and adjourned the term. Thereafter the regular Judge returned and undertook to open the term of Court again. Our Supreme Court held that where the term once ended the Judge had no power to reconvene the term. In the 118th Mo., l.c. 46, 47, Judge Gantt in writing the opinion said:

"Was there any power in Judge Wear to reopen court, and hold it, under these circumstances? We take it that it is immaterial whether Judge Houck ought to have waited or not. Inasmuch as he did adjourn the term, could Judge Wear reopen the court again as a part of the regular March term? The judicial power in this state can only be exercised at the times and places prescribed by law. Accordingly the statutes have, with great particularity, specified the day on which each court, whether circuit, county, probate or supreme court, shall meet. Out of abundant caution it is provided that, if the judge shall be detained, the sheriff may adjourn the court till the third day, when if the judge is still absent he may adjourn to the next regular term; and it is provided that the courts may upon notice call special terms, but the whole scope of the legislation on this subject as well as the common law, is to the effect that only at the stated times, and at the places specified, can a court lawfully meet. Revised Statutes, 1889, sections 3248, 3249, 3250.

"The mere coming together of the judge, and the other officers of the court, unless at a time fixed by law or on a day to which the court has been lawfully adjourned, does not constitute a court under our laws. Freeman on Judgments, section 121, and cases cited. This is so clear that we doubt whether any court or lawyer ever questions it. Galusha v. Butterfield, 2 Scam. 227; Bramley v. State, 20 Ark. 77; Dunn v. State, 2 Ark. 229; Stoval v. Emerson, 20 Mo. App. 322.

"Again and again this court held that, after a term closes, the judge nor the court has any power to change a judgment or entry. An adjournment to the next regular term concludes all further action by the officers at that term. * * *"

These cases, it is believed, furnish sound authority to apply the reasoning that if the term ends by the Judge who is still living leaving the County, not intending to return, that when the Judge dies the term ends. Following the reasoning of Judge Trimble in the Coleman case, if the Court ends for lack of a Judge where the Judge is still living but is absent, would it not with greater force apply to the case where the Judge is deceased and the conclusion be sound that upon his death his Court ended? We think it does.

The propriety and legality of the action of the Judge appointed as the successor to the deceased Judge on such matters as the issuing of orders of publication and the ordering of the sale of real estate of a decedent would be to say the least, very doubtful. Taking the Coleman case as authority that no Court can exist without a Judge, and taking the Ross Case as the authority that when the Court is once ended it cannot be revived until the next regular term of Court, it would seem that the only sound view to be taken in this matter would be that when Judge Martin died his Court ended, and that the successor Judge upon his appointment could not revive the term or transact any unfinished business of that term until the next term of Court.

CONCLUSION.

Considering the facts submitted and the above authorities cited and quoted, it is the opinion of this department that when the Probate Judge of Lincoln County died his Court ended for want of a Judge to conduct the Court, and that the present Judge, appointed to fill the vacancy in that office, does not have the authority or power to reopen the term of Court which ended upon the death of the former Judge, or to transact unfinished business thereat as a regular Court until the next February Term, 1945, of said Court.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

GWC:ir

COMMUNITY SALES: State Veterinarian given power to approve veterinarians examining livestock at sales.

September 12, 1945

FILED

20

Dr. H. E. Curry, State Veterinarian
Department of Agriculture
State Office Building
Jefferson City, Missouri

Dear Dr. Curry:

This will acknowledge receipt of your letter of September 7, 1945, requesting an opinion construing Section 10 of Committee Substitute for Senate Bill No. 11, enacted by the 62nd General Assembly, Laws of 1943, p. 310, with regard to what persons may conduct the examination of livestock authorized by the section.

The section of the law referred to is as follows:

"The State Veterinarian shall promulgate and enforce rules and regulations for the purpose of maintaining a good state of sanitation on the premises, including livestock yards, pens or vehicles used by or for the licensee in which animals are quartered, fed or transported. The State Veterinarian shall require all licensees defined in this act to obtain such inspection of all livestock offered for sale at any community sale in such manner as he may designate. The State Veterinarian, or his deputy, may in his discretion order any stock vaccinated or quarantined or both when he thinks such action advisable; provided, that the authority to require vaccination given herein shall not be construed to give the State Veterinarian power to issue a general order for the vaccination of all livestock sold in this state or sold at all community sales in

this state. Such inspections shall be made by a licensed veterinarian or deputy approved by the State Veterinarian, and in accordance with rules and regulations that may be made by the State Veterinarian not contrary to the provisions of this act. Said veterinary inspector shall be subject to dismissal by the State Veterinarian for neglect of duty in the enforcement of the provisions of this act or for misconduct while on official duty."

In order to determine the meaning of a statute there are certain rules of statutory construction that must be borne in mind. The first of these rules is that where the language is plain and unambiguous there is nothing to be construed and it must be given effect as written, *St. Louis Amusement Co., v. St. Louis County*, 147 S. W. (2d) 667, 347 Mo. 456. Another rule pertinent to your question is found in Section 655, R. S. Mo. 1939, which is the following, "First, words and phrases shall be taken in their plain and ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import;"

In Section 10 of C.S.B 11, quoted herein, the State Veterinarian is given power to promulgate rules and regulations for the purpose of maintaining sanitation in connection with community sales. The term "State Veterinarian" is defined in Section 2 of the Act if any doubt should arise as to the meaning of the words. Next, the State Veterinarian is given power to require licenses to obtain such inspection as he designates of all livestock offered for sale at community sales. This provision is plain and unambiguous. The next provision gives to the State Veterinarian or his deputy power to order stock quarantined or vaccinated. The section in the Act containing definitions does not define the word but looking at the statutes relating to the office of State Veterinarian we find the State Veterinarian is authorized by Section 14222, R. S. Mo. 1939, to appoint deputies. No ambiguity appears here.

This brings us to a discussion of the sentence pertaining to who is authorized to make the inspections authorized, and the sentence is here set out (Sec. 10, Laws of 1943, p. 314):

"Such inspections shall be made by a licensed veterinarian or deputy approved by the State Veterinarian, and in accord-

ance with rules and regulations that may be made by the State Veterinarian not contrary to the provisions of this act."

The section of the Act defining terms does not define "licensed veterinarian" or "deputy." Section 14234, Art. 12, Chap. 102, R. S. Mo. 1939, prohibits the practice of veterinary surgery and medicine by persons who are not registered veterinarians. Sections 14235 and 14236 of the same article and chapter governed the registration of veterinarians who were engaged in the practice at the effective date of the law, January 1, 1906, and Section 14237 authorizes the holding of examinations for persons who wish to become registered veterinarians. Section 14245 defines "registered veterinarian" and is as follows:

"Any person shall be regarded as a registered veterinarian who has complied with either sections 14235, 14236 or 14237 of this article and has been recorded as such, and furnished with a certificate of registration under the seal of the veterinary examining board, and whose license to practice has not been revoked."

The term "licensed veterinarian" is not found in the law relating to the practice of veterinary medicine and surgery nor is it defined in C.S.S.B. 11, 62nd General Assembly. Webster's New International Dictionary, Second Edition, defines "licensed" as "permitted or authorized by license." By Section 14245 a certificate of registration is required to be issued to all persons registered authorizing them to practice veterinary medicine and surgery. The registration would no doubt be held equivalent to licensing. So licensed veterinarian must mean registered veterinarian.

So far, no ambiguity is found. A statute is ambiguous when the language used therein is susceptible of two meanings.

The primary rule of statutory construction is to ascertain the lawmakers' intent from the words used, if possible, and to put on the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote the object and manifest purpose of the statute, *Artophone Corp. v. Coale*, 345 Mo. 344, 133 S. W. (2d) 343. Another important rule from the case of *Nordberg v. Montgomery*, 351 Mo. 180, 173 S. W.

(2d) 387, is that every sentence, phrase or word in the statute must be given some meaning if possible.

It has been shown that the words "licensed veterinarian" mean registered veterinarian. The ambiguity, if any exists, arises from the remaining words of the clause now under consideration. These words of the clause are, "**** or deputy approved by the State Veterinarian." "State Veterinarian" is defined in the Act, so the only words remaining which might be susceptible to two interpretations are "deputy approved." These two words taken alone could be interpreted to mean that a deputy who had been approved by the State Veterinarian could do the work of inspecting livestock in place of a registered veterinarian. Under this interpretation the question immediately arises as to what is a deputy. There is no such thing as a deputy registered veterinarian authorized by law. In another sentence of the section powers are conferred upon a deputy of the State Veterinarian. So that the word as here used, must have been intended to mean a deputy State Veterinarian. So either a registered veterinarian or a deputy State Veterinarian, who must be a registered veterinarian before he may be appointed a deputy, is authorized to inspect livestock which is to be sold at community sales.

This brings us to a discussion of the word "approved" as used in the sentence. Does it apply both to the "licensed veterinarian" and the "deputy State Veterinarian," or does it only apply to the "deputy State Veterinarian." To say that the word only applies to the "deputy State Veterinarian" would seem a rather absurd and unreasonable interpretation for before the State Veterinarian deputizes a veterinarian, he approves him or he would not deputize him. And the word "approved" would be useless and unnecessary. A statute should not be so construed as to give it an unreasonable meaning, where it can be given a reasonable meaning. State ex rel. St. Louis Public Service Com. v. Public Service Commission, 326 Mo. 1169. Would it not be unreasonable to say that any registered veterinarian may inspect, but that before a deputy State Veterinarian may do so he must be specifically approved by the State Veterinarian for this type of work.

This interpretation is not a particularly satisfactory one, but it is our duty to try to arrive at the intention of the lawmakers from the language used. However, if this was not the intention of the lawmakers, then all of the words after the words "licensed veterinary" are meaningless and surplusage and

the interpretation would be that any registered veterinarian could make the inspections. Such an interpretation would not be giving a meaning to every word in the sentence.

Briefly summarized this interpretation would mean, that it was the intention of the Legislature to give to the State Veterinarian discretion in designating the registered veterinarians, including Deputy State Veterinarians, to make these livestock inspections.

However unsatisfactory as this interpretation is, it seems to be borne out by Section 11 of the Act, which section is as follows (Laws 1943, p. 314):

"For the purpose of assisting in the defraying of expense of inspection service, any licensee is hereby authorized and granted the option of collecting from the consignor not to exceed an amount sufficient to cover the expense of such inspection of all livestock sold, exchanged or traded for on any such sale day. The licensee is authorized to contract with a licensed veterinarian, approved and authorized by the State Veterinarian, as to the inspection charge for services rendered by said veterinarian at each community sale."

No doubt could exist that this section makes approval of the State Veterinarian a prerequisite before employment. And in construing a statute the several parts are to be construed in connection with every other part, and all are to be considered as parts of a connected whole, and harmonized if possible, *Nordberg v. Montgomery*, 173 S. W. (2d) 327, 351 Mo. 180.

Throughout the entire Act broad powers are given to the State Veterinarian; and giving to him the power to approve or disapprove, at his discretion, registered veterinarians, including his own deputies, for this inspection work, is not inconsistent with the broad powers granted.

Conclusion

The conclusion is therefore stated that by the provisions of Section 10, C.S.S.B. 11, Laws of Missouri, 1943, p. 310

Mr. H. E. Curry

-6-

Sept. 12, 1945

the State Veterinarian is given the right to exercise his discretion in approving registered veterinarians for making the livestock inspections required by said section.

Respectfully submitted,

W. O. JACKSON

Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WOJ:EG

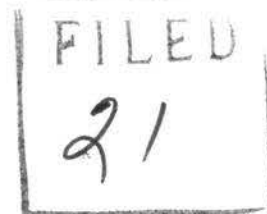
TAXATION AND REVENUE:

Method of assessing property of
manufacturing corporations.

OPINION NO. 21

November 21, 1945

Honorable Wilbur F. Daniels
Prosecuting Attorney
Howard County
Fayette, Missouri



Dear Sir:

Reference is made to your letter of November 7, 1945, requesting an official opinion of this office, and reading, in part, as follows:

"I respectfully request an opinion on behalf of Howard County on the following question: Is a manufacturing concern, operating and doing business in Howard County, liable and required to pay tax on their property so owned in Howard County by reason of 10958 and may they also be required to pay a merchant manufacturers tax by reason of 11339?"

We have examined the statutes referred to in your letter, namely, Sections 10958 and 11339, R. S. Mo. 1939.

Section 10958, R. S. Mo. 1939, reads as follows:

"All personal property of business and manufacturing corporations shall be taxable in the county in which such property may be situated on the 1st day of June of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owning personal property on the 1st day of June in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county where situated, in the same manner as other personal property is required by law to be returned. This section shall not apply to railroad or banking corporations."

Honorable Wilbur F. Daniels

You will notice that this statute appears in juxtaposition to other statutes relating to the situs of property of individuals and estates for taxation purposes. It does not by its own terms purport to provide a scheme for the assessment of such properties, but only establishes the place where taxable. In effect, this statute is merely a portion of the general scheme of taxation of manufacturers provided in Article 20 of Chapter 74, R. S. Mo. 1939.

Such scheme for the taxation of manufacturers appears generally in Section 11339, R. S. Mo. 1939. The pertinent parts of said section read as follows:

"All manufacturers in this state shall be licensed and taxed on all raw material and finished products, as well as all the tools, machinery and appliances used by them, in the same manner as is or may be provided by law for the taxing and licensing of merchants; and no county, city, town, township, or municipal authority thereof, shall ever levy any greater amount of tax against a manufacturer than is levied against merchants for the same period. On the first Monday in June in each year it shall be the duty of each person, corporation or copartnership of persons, as provided by this article, to furnish to the assessor of the county in which such license may have been granted a statement of the greatest amount of raw material and finished products, as well as all the tools, machinery and appliances used by him or them, which he or they may have had on hand at any one time between the first Monday in March and the first Monday in June next preceding; said statement shall include raw material and finished products owned by such manufacturer, as well as all the tools, machinery and appliances used by him or them. * * * After the county board of equalization shall have completed the equalization of such statements, the clerk of the county court shall extend on such book all proper taxes at the same rate as assessed for the time on real estate, and he shall, on or before the first day of October thereafter, make out and deliver to the collector a copy of such book, properly certified and take the receipt of the collector thereof, * * * Provided further, that nothing in this article be so construed as to apply to manufacturers whose raw material,

Honorable Wilbur F. Daniels

finished products, tools, machinery and appliances, in the aggregate amount, be less than one thousand dollars. Licenses issued under this article shall be for one year, ending on the first day of June of the then current year, and no other or greater amount of tax of any kind, whether state or local, shall be assessed, levied, or collected by the state, or any county or municipality, on such raw material, finished products, tools, machinery and appliances, then is levied for the same year upon merchandise, under the law regulating merchants' licenses."

The licensing and taxing statutes relating to merchants which are referred to in Section 11339, R. S. Mo. 1939, quoted above, appear as a part of Article 18, Chapter 74, R. S. Mo. 1939, and the pertinent statutes are Sections 11304, 11305 and 11309. Briefly summarized, Section 11304 imposes a penalty for engaging in the business of a merchant without a license; Section 11305 imposes an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise in the hands of merchants at any time between the first Monday in March and the first Monday in June in each year, and Section 11309 provides for the filing of a statement by such merchants disclosing the amount of such taxable property, and further provides for the equalization of such values and extension of the taxes upon the tax rolls by the county clerk, based upon such valuations as finally equalized.

Upon comparison of the statutes relating to merchants and manufacturers, it becomes apparent that the privilege of engaging in the business of either merchant or manufacturer is one extended upon payment of a license fee. The license fee for each year is to be determined by levying a tax at the rate applicable to real property upon the highest valuation of property pertaining to such business held, owned or under control of such merchant or manufacturer at any one time during the period specified by statute. The complete scheme for the taxation of manufacturers is that appearing in Article 20, Chapter 74, R. S. Mo. 1939, portions of which are quoted and discussed above. From this, we conclude that no taxes are ever imposed by virtue of the provisions of Section 10958, R. S. Mo. 1939, only the place where such taxes are to be paid being determined thereby, and that the sole taxes to which manufacturing corporations are subject upon the raw materials and finished products, and the tools, machinery and appliances used in connection with such business, are those provided by the provisions of Section 11339, R. S. Mo. 1939.

Honorable Wilbur F. Daniels

The nature of the tax imposed upon manufacturers under the provisions of this section has been declared by the Supreme Court in the case of American Mfg. Co. v. St. Louis, 192 S.W. 402, 270 Mo. 40, from which we quote:

"It is evident that the ad valorem tax levied under our State laws upon merchants and manufacturers, is a tax upon property, as distinguished from taxes upon business. The same property would be subject to taxation while its situs is within the State, whether employed in any activity or not. * * * This imposition has every element of a property tax, and is held to be such by this court. (Jarman v. Unionville School District, 264 Mo. 646; * * *)."

From the above, it is quite clear that to subject the raw materials and finished products of a manufacturer, and the tools, machinery and appliances used in connection with such manufacturing business, to additional taxes, would amount to duplicate taxation.

CONCLUSION

In the premises, we are of the opinion that the only taxes which may be validly imposed upon manufacturers are those which are provided for by Section 11339, R. S. Mo. 1939, and that Section 10958, R. S. Mo. 1939, merely provides for the place where such taxes may be levied and collected.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

W. O. JACKSON
(Acting) Attorney General

WFB:HR

MISSOURI STATE
MUSEUM:

(1) Authority of Missouri State Department of Resources and Development with respect to exhibits now in Museum and exhibits hereafter acquired; (2) suggested forms of agreements to be used in acquiring exhibits; (3) suggested form of agreement to be used in making loans of exhibits.

March 27, 1945



Honorable Hugh Denny
Acting Director
Missouri State Department of
Resources and Development
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of March 21, 1945,
reading as follows:

"The State Museum, which is also known as the Missouri Resources Museum, has been in existence for many years during which time exhibits, specimens, and miscellaneous materials have been given to or loaned to the Museum. Under House Bill 502 of the 62nd General Assembly, the administration of the State Museum was vested in the State Commission of Resources and Development. Section 10b of the above bill provided that, 'There shall continue to be maintained by the commission a Missouri State Museum, which shall be a conservational and historical museum in which shall be collected and displayed such exhibits of the products of the mines, mills, fields and forests of the State of Missouri and such other articles and products as will display the natural resources of the State of Missouri and their utilization, as the commission may deem necessary and expedient.'

"In the fulfillment of this provision, the Commission deems it advisable to rearrange the Museum and change some of the material on display. There is in the Museum and in store rooms a large amount of material which we

March 27, 1945

interpret to be foreign to the type of Museum specified in House Bill 502 of the 62nd General Assembly. This material has its proper place in museums, but not necessarily in the Missouri State Museum under the present law. We believe it would be in the public interest to arrange some means of transferring material from the Missouri State Museum to other museums or places where the material would be properly displayed and serve a public use.

"We would like your advice as to the preparation of an agreement which could be entered into between the State Commission of Resources and Development and other museums, state departments, public schools, or semi-official organizations, this agreement to provide that materials given to the State Museum, when loaned to another organization, shall be subject to recall if the Commission of Resources and Development should at a later date deem such action necessary.

"We would also like to have your assistance in the preparation of a form of acceptance to be used when additional material is submitted to the Museum, either as a gift or as a loan. I believe any such agreement should be prepared so that if it became evident to the administrators of the Museum that the material was not serving a worthy purpose in that Museum, it could be returned to its original owners or heirs or to some other public or semi-public body to which such exhibits would be germane.

"We have at this time a large number of books and manuscripts which are stored in the Museum but which have no foreseeable prospect of being displayed by the Missouri State Museum. It so happens that the Agricultural College at the University of Missouri is very much interested in this material and would be able to compile the manuscripts and make good use of the material which we have. We would like very much to cooperate with the University College of Agriculture by making this material available to

them under whatever arrangements are necessary to make the transaction legal and protect the State's interest.

"If further information is desired on this matter, I shall be glad to discuss the subject with you or submit additional information."

I.

Under the provisions of Section 10b, found in Laws of 1943, at page 983, the control and supervision of the Missouri State Museum has been transferred to the State Department of Resources and Development.

We feel that the broad grant of power contained in the above mentioned section is sufficient to authorize the Commission of Resources and Development to deal with exhibits now in the Museum, or which may hereafter be acquired, in any reasonable manner it may see fit, in the exercise of its discretion. We believe that such commission is empowered to make arrangements with other public bodies for the display of exhibits belonging to the Missouri State Museum, to the end that such exhibits may be used to fulfill the purposes for which the Museum has been established. There are no specific restrictions incorporated in the statute creating the Museum limiting the display of museums to the State Capitol; rather there is an indication of a contrary legislative intent in the following quoted portion of Section 10b:

" * * * The Commission of the Permanent Seat of Government shall designate such part of the first and second floor of the Capitol Building as it thinks advisable to be used as a part of the Missouri State Museum. * * * "

II.

We believe the following form of agreement to be proper for use in acquiring exhibits by gift:

(Form No. 1)

ARTICLES OF GIFT

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned, _____, of the County of _____, State of _____, hereinafter referred to as Donor, do hereby set over and transfer as an irrevocable gift unto the Missouri State Department of Resources and Development, hereinafter referred to as Donee, and such other successor governmental agencies as may hereafter accede to the authority now exercised by such Donee with respect to the Missouri State Museum, the following described personal property of the Donor:

(Schedule of gift or gifts)

IN WITNESS WHEREOF, the said Donor has hereunto subscribed his hand and seal, this _____ day of _____, 19____.

STATE OF _____ }
COUNTY OF _____ } ss

On this _____ day of _____, 19____, before me personally appeared _____, to me known to be the person described in the foregoing instrument, and who executed the same and acknowledged the execution thereof as his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal of office, in said State and County, the day and year first herein written.

Notary Public

My commission expires _____

March 27, 1945

We believe the following form of agreement to be proper for use in acquiring exhibits by loan:

(Form No. 2)

ARTICLES OF LOAN

THIS AGREEMENT, Made and entered into this ____ day of _____, 19____, by and between _____, of the County of _____, State of _____, hereinafter referred to as Donor, and _____, as Agent for the Missouri State Department of Resources and Development, hereinafter referred to as Donee, Witnesseth:

That said Donor does hereby agree to deliver unto said Donee the following items of personal property of the Donor, hereinafter referred to as Exhibit:

(Schedule of items)

Said Donee agrees to accept said Exhibit and display the same in the Missouri State Museum, or in such other places as Donee may determine to be proper. Said Donee specifically reserves the privilege of lending such Exhibit, or any portion thereof, to such other public bodies as it may deem fit, and whose use of such Exhibit shall be in harmony with the purposes of the Missouri State Museum. The said Donee shall not be liable for the loss or destruction of said Exhibit, or any part thereof, during the time said Exhibit shall be in the custody of Donee, or any other public body, by virtue of any loan agreement with Donee. Said Donee agrees to deliver said Exhibit, or any part thereof, to Donor upon written demand therefor being made by Donor to Donee by registered mail addressed to Donee at Jefferson City, Missouri. Said delivery shall be made within sixty days after receipt of such demand; and to be made at the site of display of said Exhibit.

This agreement shall inure to the benefit of any governmental agency or agencies that may accede to the authority now exercised by the Donee herein with respect to the Missouri State Museum.

IN WITNESS WHEREOF, the parties hereto have caused these

March 27, 1945

presents to be executed, in duplicate, the day and year first herein written.

(Use same form of acknowledgment as appended to Form No. 1)

We believe the following form of agreement to be proper for use in making loans of exhibits:

(Form No. 3)

ARTICLES OF LOAN

THIS AGREEMENT, Made and entered into this _____ day of _____, 19____, by and between the Missouri State Department of Resources and Development, hereinafter referred to as Lender, and _____, of the County of _____, State of _____, hereinafter referred to as Borrower, Witnesseth:

That said Lender does hereby lend unto said Borrower the following items, hereinafter referred to as Exhibit:

(Schedule of items)

Said Borrower agrees to accept said Exhibit and display the same in accordance with the rules and regulations of Lender, and to preserve and to protect the same. The said Borrower further agrees to return said Exhibit unto Lender upon demand therefor, said return to be made within thirty days after receipt of such demand, and to be made at the office of Lender in Jefferson City, Missouri.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed, in duplicate, the day and year

Honorable Hugh Denny

-7-

March 27, 1945

first herein written.

(Use same form of acknowledgment as appended to Form No. 1)

We trust the above information and suggested forms may be of some assistance to your department. If in the future you have need for specific agreements to cover peculiar conditions attached to loans or gifts being made, we shall be pleased to further advise you in the premises.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

MISSOURI STATE DEPARTMENT OF
RESOURCES AND DEVELOPMENT:

Duties and authority with respect
to functions previously discharged
by the Planning Board of the State
of Missouri and with respect to
the Missouri State Museum.

April 25, 1945

FILED

22

Mr. Hugh Denny
Acting Director
Missouri State Department of
Resources and Development
Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter dated April 19,
1945, requesting an official opinion of this office, and read-
ing as follows:

"At the Commission meeting on April 17, I
was directed to secure from the Attorney
General a statement on the statutes relat-
ing to the Missouri State Museum and the
State Planning Board which are still opera-
tive and were not repealed under House Bill
502 of the 62nd General Assembly which
created this Commission.

"I will appreciate it very much if you
would review these statutes and inform this
office of those acts which our Commission
should be cognizant of in assuming responsi-
bility for the State Planning Board and the
Missouri State Museum."

We have carefully examined the statutes referred to in
House Bill No. 502 of the 62nd General Assembly and find that
by the enactment of such House Bill, appearing in Laws 1943,
at page 982, all statutes found in the 1939 Revised Statutes
have been outright repealed. Such statutes so repealed were
Nos. 15391 to 15393, inclusive, which created and provided for
the duties of the State Planning Board, and Sections 15441 to

Mr. Hugh Denny

-2-

April 25, 1945

15443, inclusive, which created the Missouri State Museum. From and after the effective date of the new law found in Laws of 1943, at page 982, these statutes have been completely inoperative. As appears from the Act itself, Sections 15391 to 15393, inclusive, R. S. Mo. 1939, have been replaced by Section 8b; and Sections 15441 to 15443, inclusive, R. S. Mo. 1939, have been replaced by Section 10b of the Act.

CONCLUSION

In the premises, we are of the opinion that the Missouri State Department of Resources and Development should be guided by the provisions of Section 8b of the Act found in Laws of Missouri, 1943, at page 982, with respect to the duties previously discharged by the State Planning Board of the State of Missouri, and should be further guided by Section 10b of the same Act with respect to the duties of the Commission relating to the Missouri State Museum.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

LEGISLATURE; Duly elected officers of the House of Representative entitled to compensation as provided by law until the end of the session in which they have been elected, unless sooner removed by the members of the Legislature.

July 27, 1945



Honorable James F. Dent
Representative of Dent County
Jefferson City, Missouri

Dear Sir:

We are in receipt of your written request for an opinion, which reads as follows:

"I am hereby submitting my request for an official opinion as to whether employees listed under Rule 25 of the Rules of the House for the Sixty-third General Assembly of Missouri, are entitled to pay subsequent to the recess of the House on June 29th, 1945."

Section 18, Article III of the Constitution of Missouri of 1945, provides as follows:

"Each house shall appoint its own officers; * * * may determine the rules of its own proceedings, except as herein provided; * * *"

Pursuant to the above constitutional provisions the House of Representatives in proper manner has adopted rules of the House for the Sixty-third General Assembly of Missouri, and among these rules is Rule 25, which provides as follows:

"The House shall, at the commencement of each session, and as soon as may be necessary, elect a Chief Clerk, an Assistant Chief Clerk, a Clerk of the Committee of Bills Perfected and Printed, a Clerk of the Committee on Bills Agreed To and Finally Passed, a Reading Clerk,

a Doorkeeper, a Sergeant-at-Arms, an Official Reporter, a Chaplain, a Postmaster, a Chief Stenographer, and an Assistant Chief Stenographer, who shall hold their offices until the end of the session in which they shall have been elected, unless sooner removed by a vote of the members present, and who shall be entitled to such compensation as may be provided by law. They shall respectively take the oath to support the Constitution of the United States and of this State and faithfully demean themselves in office and keep the secrets of the House, which oath shall be administered by the Speaker."

Rule 145 of the Rules of the House for the Sixty-third General Assembly provides as follows:

"No standing rule or order of the House shall be dispensed with, except by unanimous consent or unless a constitutional majority concur therein, and motions for that purpose shall be limited to the question or proposition under consideration."

Under the rules quoted above, after the House has duly elected the officers as provided for in Rule 25, supra, the officers named therein hold their offices until the end of the session in which they have been elected, unless sooner removed by a vote of the members present, and are entitled to such compensation as may be provided by law.

Because of Rule 145, supra, Rule 25, supra, may not be abrogated or changed in any manner, except by unanimous consent or unless a constitutional majority concurs in such action.

In *Marchants Exchange v. Knott*, 212 Mo. 616, 1. c. 640, the court gives the following definitions:

"* * * Briefly, legislative power is the power to make laws. What is a law? 'Municipal law,' says Chancellor Kent, 'is a rule of civil conduct prescribed by the supreme power of a state.' (1 Kent Com. (14 Ed.), 447.) That definition is part of Sir William Blackstone's, which

July 27, 1945

adds, 'commanding what is right and prohibiting what is wrong.' In his notes to Blackstone (1 Sharswood's Blk. Comm., p. 44) Judge Sharswood defines a law to be: 'A rule of civil conduct prescribed by the supreme power in a State, commanding what is to be done, and prohibiting the contrary.'

"Now, a rule is a rule, as distinguished from whim, caprice, compact, agreement, or mere discretion. 'Prescribed' means that the rule must not remain in the breast of the Legislature but shall be manifested and published in a public and conspicuous manner so as to be known as a rule of civil conduct. (1 Blk., p. 45.)* * *"

Then, when the Legislature, acting within its power, adopts certain rules as the supreme power of the State of Missouri and publicly acknowledges these rules governing its conduct, they should be as jealously guarded and followed as any other law of the land.

Conclusion

Therefore, it is the opinion of this department that the officers of the House of Representatives that are listed under Rule 25 of the Rules of the House for the Sixty-third General Assembly, hold their offices until the end of the session in which they have been elected, unless sooner removed by a vote of the members present and during this period that they hold their offices they are entitled to such compensation as may be provided by law.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General
AVO:EG

MUNICIPAL CORPORATIONS: Authority to acquire and control real property for the purpose of operating airports within and without the State of Missouri.

September 20, 1945



10/27

Mr. Hugh Denney, Director
Missouri State Department of
Resources and Development
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter dated September 18, 1945, requesting an official opinion of this office, and reading as follows:

"We have been requested on several recent occasions for information on whether or not a city can purchase land across a river in another county or in another state for airport purposes. Of course we have been unable to answer this question, therefore, I would like an opinion from your office as to the legality of a town such as Hannibal or St. Louis buying land for airport purposes and operating an airport across the Mississippi River in Illinois.

"I would also like to have information on the jurisdiction of a city like Jefferson City over an airport developed across the Missouri River in Callaway County. There may be a number of such situations arise in the future and your opinion on this subject would be of great value in expediting airport development."

Your inquiry resolves itself into two components:

- (1) The authority of municipal corporations to acquire and operate airports outside their corporate limits but within the territorial boundary of the State of Missouri; and
- (2) The authority of municipal corporations to acquire and operate airports outside their corporate limits and without the territorial limits of the State of Missouri.

Certain general observations are equally applicable to both of the questions propounded. It is said that municipal corporations have the common law power to acquire and hold property for corporate purposes, the rule being stated thusly in "Municipal Corporations," 43 C. J., page 1326, from which we quote:

"Among the common-law powers of municipal corporations are the powers to grant and receive, and to purchase and hold property, real and personal, for themselves and successors. These powers are inherent, or, as phrased by Blackstone, 'necessarily and inseparably incident to every corporation;' but usually the charters of municipal corporations or the general statutes in express terms give them the power to hold, purchase, and convey such real and personal property as their purposes may require; and it has been said that generally a municipal corporation may only acquire and hold property according to the will of the legislature expressed in the statutes. * * * There is, however, no general power to acquire and hold real estate; but such power is confined to the purposes and necessities of the municipality. Within these limits the power may be exercised with freedom, and such title taken as is appropriate to the exercise of the power; and the nature of the tenure will depend upon the purpose for which the property is acquired and used."

That the authority of municipal corporations to acquire and hold real property for their corporate purposes has been granted by the Legislature was declared in the early case of *Chambers v. City of St. Louis*, 29 Mo. 543, 1. c. 573:

"By the first section of the act concerning corporations, (R. C. 1845,) the incidents of all corporations are enumerated, one of which is 'to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter.' The third section of the same act provides that 'in addition to the powers enumerated in the first section of this article, and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given.' * * * *

"There is nothing in our statute concerning wills which prohibits corporations from taking by devise; so that, as to their capacity to take by devise, they stand on the same ground as natural persons. The section of the statute concerning corporations above cited, in which are enumerated the incidents which result from the creation of a body politic or corporate, must be regarded as a substitute for the incidental powers which by the common law were annexed to every corporation. A corporation can do no act which is not expressly or impliedly authorized by its charter, or by the act under which it is created. The City of St. Louis is authorized to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in her charter. This is by the general law concerning corporations. No amount being fixed by her charter, she can hold as much as shall be necessary for the purposes for which she was created a body corporate. * * * *

"It is not denied but that the city, under her charter, could take all the lands devised to her within her limits, if the devise had been to her own use, uncoupled with the trust to which, by the terms of the devise, it was subjected. But it is maintained that, as to the lands outside of her limits, she could only take them for the specific purposes enumerated in the section to which reference has been made; and it is insisted that the enumeration of the particular purposes for which lands may be held beyond the limits of the city is an exclusion of all other purposes for which lands thus situated may be held. But the force of this argument is broken, when we consider that, independently of the powers conferred by the charter, the city had, under the section of the act concerning corporations above cited, a power to hold such lands, without regard to their locality, as may be necessary for the purposes of the corporation; and the third section of the same act declares that such power shall be in addition to any power that may be conferred by the charter. Statutes in pari materia are to be construed so that they may all stand. A repeal of the statute by implication is not favored in law. Lands held by the city beyond her limits would be held by her as by any individual proprietor, and her powers over them would only be commensurate with those enjoyed by private owners. But, by authorizing her to hold lands beyond her limits for objects intimately connected with the purposes of the corporation and highly necessary for her prosperity and welfare, it was intended that, over such places, she should exercise such police powers as would be required in order to make them answer the purposes for which they were designed." (Emphasis ours.)

That such authority may yet be exercised by municipal corporations under the reasoning embodied in the Chambers case, supra, appears from Section 4 of an act found in Laws of 1943,

page 416, subsection (d), which reads as follows:

"In order to carry out the purposes for which it is organized, each corporation shall have power:

* * * * *

"(d) To hold, purchase, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require, and also to take, hold and convey such other property, real, personal or mixed, as shall be necessary or requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability belonging to the corporation; provided, however, that such corporation shall not hold any real estate for any period longer than six years except such as may be necessary for carrying on its legitimate business."

Narrowing the general rules down to the authority to acquire and hold real property for airport purposes, we find that by the provisions of Section 15122, R. S. Mo. 1939, specific authority has been granted to municipal corporations to do so. We quote said section:

"The local legislative body of any city, including cities under special charter, village or town in this state is hereby authorized to acquire, by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate, in whole or in part, alone or jointly or concurrently with others, airports or landing fields for the use of airplanes and other aircraft either within or without the limits of such cities, villages, or towns, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city, village, or town."

This authority was further extended to municipal corporations under special charter, under the provisions of an act found in Laws of 1943, Section 15125, page 326, which is similar in provisions to the section quoted above.

Further, the General Assembly has declared the acquisition, ownership and control of such real property by municipal corporations for the purposes mentioned to be a public purpose and a matter of public necessity. Such declaration is embodied in Section 15124, R. S. Mo. 1939, which reads as follows:

"Any lands acquired, owned, controlled or occupied by such cities, villages, towns or counties for the purposes enumerated in sections 15122 and 15123 hereof shall and are hereby declared to be acquired, owned, controlled, and occupied for a public purpose and as a matter of public necessity, and such cities, villages, towns, or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public necessity."

Even aside from the statutory authorization to acquire and control real property for airport purposes found in the sections mentioned above, namely, Sections 15122 and 15125, R. S. Mo. 1939, we believe the declaration that it is a public purpose and necessity, found in Section 15124, R. S. Mo. 1939, would be ample justification for municipal corporations doing so, particularly when viewed in the light of the opinion of the Supreme Court in *Hafner v. City of St. Louis*, 161 Mo. 34, 1. c. 43, from which we quote:

"Though among the enumerated charter powers of the city, at that time in force, no express power is conferred upon the city of St. Louis to purchase, hold or receive land for wharf purposes beyond its corporate limits, and while it is true that the city, in that regard, must act within the express or implied authorization of its charter, by reading its charter powers in connection

with its general authority under the statute, 'to hold, purchase and convey such real and personal estate, as the purposes of the corporation shall require, not exceeding the amount limited by its charter,' and remembering that no express restriction is found in the city charter against the purchase of real estate for wharf purposes, it would seem that the city, under its general statutory power, could receive and hold such property, beyond its corporate limits, not prohibited by its charter, and essentially necessary for the purpose of carrying out one of its proper corporate functions and duties, as the establishment, construction and maintenance of a general wharf system along its river front, and by further bearing in mind the fact that in so doing, the beginning or termination of a perfect wharf system must of necessity involve a disregard of the exact corporation limits of the city, as at the particular time established. In our opinion the mere directory power of the charter, as to the right of the city to purchase, hold and receive real estate, outside of the corporate limits of the city, for particular designated purposes, should not be construed as an absolute limitation upon the general power conferred upon the city under section one of the statute concerning corporations above cited, to purchase and hold real estate wherever located, when it becomes necessary for the purposes of the corporation. The necessities of the city, under the statute, constitute ample warrant for the purchase of land wherever located, for other purposes than those designated in its charter. * * *
(Emphasis ours.)

With reference to your first question, we conclude that it is answered by the quoted decisions above and the specific authorization found in Sections 15122 and 15125, R. S. Mo. 1939, quoted supra. From these decisions and statutes, it is apparent that authority exists in municipal corporations to go beyond their corporate limits to acquire and control real

property for the purpose of operating thereon airport facilities. You have mentioned in your letter of inquiry the fact that such airports may be situated in a county other than that in which the municipal corporation is located. We do not consider this material, as it is a matter of common knowledge that in many instances municipal corporations are located in more than one county. We believe that the general rules quoted would obviate the necessity of giving any regard to the location of county lines.

With respect to the second question you have propounded, we direct your attention to the case of *Langdon v. City of Walla Walla*, 193 Pac. 1, 1. c. 3, from which we quote:

"We first inquire, Has the city of Walla Walla the power, in so far as its own organic law is concerned, to acquire property of the nature and for the purpose here in question, which is situated in the state of Oregon; that is, do the laws of this state grant to the city the privilege of acquiring such property in another state? In the enumeration of powers of cities of the second class, to which class Walla Walla belongs, we read in section 7612, Rem. Code, as follows:

"'44. Waterworks: To provide for the erection, purchase or otherwise acquiring of waterworks within or without the corporate limits of the city to supply such city and its inhabitants with water. * * *"

(You will note the authorization contained in this grant is almost identical with the authorization contained in Sections 15122 and 15125, R. S. Mo. 1939, relating to the matter under consideration.)

"And in section 8005, Rem. Code, the first section of the act relating to the acquiring of public utilities by cities under which the city is proceeding, we read:

"Any incorporated city or town within the state be, and hereby is, authorized to con-

struct, condemn and purchase, purchase, acquire, add to, maintain, conduct and operate waterworks, within or without its limits. * * * ,

"In so far as this constitutes authority for the city acquiring and owning property of the nature here in question outside of the city's corporate limits, it manifestly is authority for the city acquiring and owning property so situated, in its proprietary, and not in its governmental, capacity. That is, authority to acquire and own such property just as any corporation, other than municipal, could exercise ownership over public utility property. We find nothing in the organic law of our cities suggesting that their governmental authority shall extend beyond their corporate limits, now, since a city's ownership and dominion over such property is of this nature, and the city is unqualifiedly authorized to acquire such property 'without' as well as 'within' its corporate limits, we are quite unable to see that the power of acquiring and owning such property is limited to property within our own state.

"The suggestion that, to allow a city of this state to acquire property of the nature here in question in another state would, in effect, be an assumption of extraterritorial jurisdiction, we think is wholly without force, in view of the fact that the city's ownership of such property situated outside its own territorial limits, whether within or without this state, is only the ownership and control over such property in the city's proprietary capacity. Such ownership does not, to our minds, suggest an assumption of extraterritorial governmental jurisdiction, either on the part of the state of Washington or of its cities, over property, situated in another state. If the laws of Oregon permit the city of Walla Walla to acquire and own within that state property of the nature and for the use here in question; which as we think will presently appear, though that is apart from this particular

inquiry, manifestly we must presume that the courts of Oregon will protect the property rights the city so permissively acquires in that state, the same as they will protect the property rights of any other similar ownership of property therein, and that, should such protection be refused by the Oregon courts, the courts of the United States will afford such protection.

"The state of Oregon may, of course, if it so choose, withhold from the cities of this state the right to acquire property in that state, just as it may withhold such right from any other foreign corporation, but that does not argue that this state has not given to its cities such power of acquisition and ownership of property as will enable them to acquire property in Oregon by consent of that state. This, we think, is as far as we need go in our inquiry touching the power of the city of Walla Walla under its organic law; that is, under the laws of this state which brought the city into being, and gave to it the powers specified in the statutes above quoted from. We conclude, then, that the city of Walla Walla does possess in its proprietary capacity the power to acquire and own in the state of Oregon, so far as it may be necessary for it to acquire such power from the state of Washington. Whether or not and to what extent the city may be able to exercise such power in the state of Oregon is, of course, a question to be decided under the laws and Constitution of that state. * * * "

We have been unable to locate an exactly similar case in the appellate court decisions of the State of Missouri, but the case of *Haeussler v. St. Louis*, 205 Mo. 656, 1. c. 585, 688, contains similar reasoning:

"Another and further contention is that the city cannot make this needed public improvement because one end of the bridge and the approach or approaches thereto will be in the

State of Illinois. As has been already noted, there is no question as to right of the city to construct a bridge, one portion of which shall be beyond its own corporate limits. Nor is there any question that for a proper public municipal purpose it may acquire and hold property beyond its own corporate limits. But the question here is, can it for this public purpose acquire and own land in Illinois and construct and maintain a public bridge over a navigable stream, one end of which must of necessity be in a foreign State? We think so. * * *

" * * * The municipal corporation had the right to go beyond its corporate limits and acquire property for this public municipal purpose, and Congress simply says, that with our power over interstate commerce, by land as well as by water, you can extend or make your public highway over a navigable stream, and do what we can do, i. e., take private property therefor, compensating the owner as provided by law.

"Under the views expressed by Justice Gray, supra, it is not even necessary to obtain the consent of the State of Illinois. This view is sound in our judgment. * * * "

You will note that under the facts in that case the authority had been granted by an act of Congress, rather than by the General Assembly of the State of Illinois, for the City of St. Louis to acquire such real property. With this exception, the reasoning with respect to the power of the municipal corporation is identical.

The opinion in the Haeussler case was not concurred in by the full court. However, as appears from the record of the Supreme Court, the opinion, written by Graves, J., was concurred in by Lamm, J.; Gantt, C. J., concurred in the result and all of the opinion except paragraph five, which is the portion quoted supra, and as to that paragraph expressed no opinion; Valliant and Fox, JJ., concurred in the result and all of the opinion except paragraph five, to which they dissented; Woodson, J., dissented in toto.

However, the effect of the opinion has been followed in a subsequent case decided by the Circuit Court of Appeals of the Seventh Circuit. This case, entitled *Latinette v. City of St. Louis*, is reported in 201 Fed. 676, and in which the following appears:

"That Missouri by her statutes and decisions (*Haeussler v. St. Louis*, 205 Mo. 656, 103 S. W. 1034) had authorized St. Louis to build and maintain the bridge in question, together with the necessary approaches, and for that purpose to buy or appropriate lands in Missouri, to buy lands in Illinois, and to accept a federal grant of right to appropriate lands in Illinois, seems to be settled beyond controversy."

Inasmuch as the decision in the *Haeussler* case has received the sanction of this Federal Court, we are constrained to follow the same reasoning as being applicable to the present question.

CONCLUSION

In the premises, we are of the opinion:

(1) That municipal corporations have the authority to acquire and control real property for the purpose of operating airport facilities located either within or without their corporate limits and within the State of Missouri, without regard to whether or not such real property is located within the same county as such municipal corporation.

(2) That municipal corporations have the authority to acquire and control real property for the purpose of operating airport facilities located outside the territorial limits of the State of Missouri, subject to the laws and Constitution of the state wherein such real property be situate.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.
Assistant Attorney General

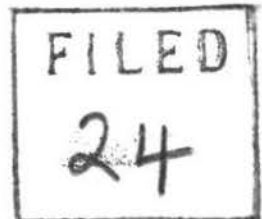
J. E. TAYLOR
Attorney General

WFB:HR

SERVICEMEN: Certain parts of Senate Bill No. 32 unconstitutional.

July 17, 1945

Honorable Phil M. Donnelly
Governor of Missouri
Jefferson City, Missouri



Dear Governor Donnelly:

In answer to your request of July 16, 1945, for an opinion as to the constitutionality of Senate Bill No. 32, we will take up the sections of the Act in the order of their appearance in the bill.

Section 1 provides as follows:

"For the purposes of taking advantage of the Servicemen's Readjustment Act of 1944, Chapter 268, Public Law 346, (S. 1767), any person who is a resident of Missouri and who served honorably in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war, may execute a deed of trust, mortgage, or other instrument, affecting the title to or disposition of real or personal property, or a power of attorney, the validity of which is governed by the law of this State. For the purposes of taking advantage of said Federal Act such person may also contract, or borrow money for the purchase or construction of homes, farms and business property whether the money is to be used in purchasing residential property or in constructing a dwelling on unimproved property owned by him to be occupied as his home. For the purposes of taking advan-

tage of said Federal Act such person may also borrow money for the purpose of making repairs, alterations, or improvements in, or paying delinquent indebtedness, taxes, or special assessments on residential property owned by the veteran and used by him as his home. For the purposes of taking advantage of said Federal Act such person may also borrow money to purchase any land, buildings, live stock, equipment, machinery or implements, or in repairing, altering, or improving any buildings or equipment, to be used in farming operations, borrow money to purchase any business, land, buildings, supplies, equipment, machinery, or tools to be used in pursuing a gainful occupation, (other than farming), and to borrow money, enter into a contract, agreement or other instrument in writing as may be necessary under the Servicemen's Readjustment Act of 1944."

Section 1, by implication, partially repeals the effect of Section 3358, R. S. Mo. 1939, which provides as follows:

"No action shall be maintained whereby to charge any person upon any debt contracted during infancy, unless such person shall have ratified the same by some other act than a verbal promise to pay the same; and the following acts on the part of such person after he becomes of full age shall constitute a ratification of such debt: First, an acknowledgment of, or promise to pay such debt, made in writing; second, a partial payment upon such debt; third, a disposal of part or all of the property for which such debt was contracted; fourth, a refusal to deliver property in his possession or under his control, for which such debt was contracted, to the person to whom the debt is due, on demand therefor made in writing."

Section 1 would allow a veteran to enter into binding contracts pursuant to the provisions of the Servicemen's Readjustment Act of 1944, Chapter 268, Public Law 346, regardless of his age, even though he were under the age of eighteen. This provision is in derogation of the settled law as appearing in *Windisch, et al. v. Farrow, et al.*, 159 S. W. (2d) 392, which holds as follows:

"* * * It is settled law that though a minor is not absolutely incapable of contracting in the sense that his contract is absolutely void, but his contract is voidable only, he has a right to disaffirm his contract at any time during his minority or within a reasonable time after attaining his majority, and the disaffirmance of his contract nullifies it and renders it void ab initio. *Hamlin v. Hawkins*, 332 Mo. 1098, 61 S. W. 2d 348, loc. cit. 350; *Phillips v. Savings Trust Co.*, 231 Mo. App. 1178, 85 S. W. 2d 923, loc. cit. 925; *Robison v. Floesch Const. Co.*, 291 Mo. 34, 236 S. W. 332, 20 A.L.R. 1239."

Also, it appears that the requirements of Section 1 are not the same as those contained in the Servicemen's Readjustment Act of 1944. Title III, Chapter V, General Provisions for Loans, Section 500, provides as follows:

"* * * Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war and who shall have been discharged or released therefrom under conditions other than dishonorable after active service of ninety days or more, or by reason of an injury or disability incurred in service in line of duty, shall be eligible for the benefits of this title. * * *"

Section 1, Senate Bill No. 32, provides: "* * * any person who is a resident of Missouri and who served honorably in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war, * * *" and these requirements not being the same as those required in the Federal law would undoubtedly cause some conflict and unfairness, because of the gap existing between the requirements as set forth in Section 1 of Senate Bill No. 32 and Section 500, supra, of the Servicemen's Readjustment Act of 1944.

There can be no objection to Section 1 on the ground that it violates Article III, Section 40, of the Constitution of 1945, that the General Assembly shall not pass any local or special law. In *Ballentine v. Nester*, 164 S. W. (2d) 378, the Missouri Supreme Court held as follows:

"'A classification for legislative purposes must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. It cannot be an arbitrary classification. The Legislature may pass laws applicable to a particular class of individuals, but such laws must bear equally upon all individuals coming naturally within the class. The Legislature may not classify by characteristics or qualities which might distinguish individuals unless that distinction applies to the particular matter under consideration.' Ex parte French, 315 Mo. 75, loc. cit. 83, 285 S. W. 513, loc. cit. 515, 47 A.L.R. 688."

The classification in Section 1 bears a reasonable and just relation in respect to the classification proposed, that is, to all veterans entitled to benefits under the Servicemen's Readjustment Act of 1944. This is not an arbitrary classification and bears equally upon all individuals coming naturally within the class.

Section 2 provides as follows:

"The disability of minority of any person not under the age of eighteen otherwise eligible for guaranty of a loan pursuant to the Servicemen's Readjustment Act of 1944 (58 Statutes at Large 284) and of the spouse of such person is hereby removed solely for the purposes of acquiring or encumbering, or selling and conveying property and the incurring of indebtedness or obligations incident to either or both, or the refinancing thereof, and litigating or settling controversies arising therefrom, if all or part of the obligations incident to such transaction be guaranteed by the Administrator of Veteran's Affairs pursuant to such Act and an application signed by such minor, or if the property is covered by a loan so guaranteed; provided nevertheless, that this Act shall not be construed to impose any other or greater rights or liabilities than would exist if such person and such spouse were each above the age of twenty-one years. And any person who signs any deed of trust, mortgage, contract, agreement, conveyance or other instrument in writing for the purposes required by the provisions of the Servicemen's Readjustment Act of 1944, if under the age of twenty-one years but not under the age of eighteen years when such instrument is executed, shall not have the right to repudiate the written obligation so made upon reaching the age of twenty-one years for the reason that he or she was under the age of twenty-one years when signing such instrument. And any instrument executed prior to the effective date of this Act by a person in obtaining guaranty of a loan under the Servicemen's Readjustment Act of 1944 only who is under the age of twenty-one years but not under the age of eighteen years when signing such instrument is hereby validated, ratified and confirmed."

Section 2 by implication changes the provisions of Section 374, R. S. Mo. 1939, which provides as follows:

"All persons of the age of twenty-one years shall be considered of full age for all purposes, except as otherwise provided by law, and until that age is attained they shall be considered minors: Provided, however, that when any person under twenty-one years of age is married to an adult who has or claims any interest in real estate and wishes to convey, encumber, lease, or otherwise dispose or affect the same, such minor shall be deemed of age for the purpose of joining with his or her adult spouse in the execution of any instrument affecting such spouse's real estate."

In our opinion, the quoted parts of Section 2 that are not underlined are not objectionable for constitutional reasons.

The Legislature has often undertaken to provide for the legal ages of both males and females. Prior to 1865 females were not of full age until twenty-one. After that, females were of age at eighteen, until 1921, when the legal age was made twenty-one by Laws of 1921, page 399. The Act of 1939, reenacting Section 374, supra, added the proviso allowing any person under twenty-one years of age married to an adult who has or claims any interest in real estate and wishes to convey, encumber, lease, or otherwise dispose or affect the same, to be deemed of age for the purpose of joining with his or her adult spouse in the execution of any instrument affecting such spouse's real estate.

There can be no objection to Section 2 on the ground that it violates the provisions of Article III, Section 40, of the Constitution of 1945, that the General Assembly shall not pass any local or special laws, for the same reasons that we hold that Section 1 does not violate Article III, Section 40, of the Constitution of 1945.

However, we do believe that the underlined portion of Section 2 is unconstitutional and that it is in violation of

Article I, Section 13, of the Constitution of 1945, which provides as follows:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

The Missouri Supreme Court held, in *Nahorski v. St. Louis Electric Terminal Ry. Co.*, 274 S. W. 1025, as follows:

"Statutes fixing 'full age' or legal majority affect the personal status of persons coming within it and the validity of their contracts. They are not merely procedural or remedial laws. To hold that this statute is retrospective in its operation would be to hold it unconstitutional. Section 15, art. 2, Constitution of Missouri. If its intent is, as plaintiff contends, to extend the minority of all persons who were over 18 and under 21 years of age at the time of its passage, it impairs the obligation of contracts entered into by such persons while they were of legal age under the prior statute, and the statute would have to be declared unconstitutional.***"

The valid part of Section 2 is probably applied effectively even though the underlined portion is unconstitutional. Nevertheless, the unconstitutional part would undoubtedly cause some unfortunate litigation in the future.

The court held, in *Poole & Creber Market Co. v. Breshears*, 125 S. W. (2d) 23, as follows:

"Moreover, even if the legislative declaration above quoted should be held void, as unconstitutional, it would not affect the validity of the remainder of the statute. It is well settled that a stat-

ute may be sustained as constitutional in part though void in other parts, unless its provisions are so connected and interdependent that it cannot be presumed the legislature would have enacted one without the other. 'The test * * * is whether or not * * *, after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, which the Legislature would have enacted if it had known that the excised portions were invalid.' State ex rel. Audrain County v. Hackmann, 275 Mo. 534, 205 S. W. 12, 14. The rule is thus succinctly stated in State ex inf. Hadley v. Washburn, 167 Mo. 680, 697, 67 S. W. 592, 596, 90 Am. St. Rep. 430: 'Where the part of an act that is unconstitutional does not enter into the life of the act itself, and is not essential to its being, it may be disregarded, and the rest remain in force.' That is the case before us. The declaration complained of may be eliminated and a law remains as complete and workable in every respect as it is with that declaration and which would as fully express and effectuate the obvious legislative purpose."

The provisions of the underlined part of Section 2, quoted above, are not so connected and interdependent that it cannot be presumed the Legislature would not have enacted the rest of the Act had it known that the underlined part above quoted was invalid. And, it is our belief that the unconstitutional portion does not enter into the life of the Act itself, and is not essential to its being, and it may be disregarded, and the rest of the Act still remain in force.

We do not question the validity of Section 3, Section 4, or Section 5.

CONCLUSION

Therefore, it is the opinion of this department that the following part of Section 2, Senate Bill No. 32, which

July 17, 1945

reads as follows: "And any instrument executed prior to the effective date of this Act by a person in obtaining guaranty of a loan under the Servicemen's Readjustment Act of 1944 only who is under the age of twenty-one years but not under the age of eighteen years when signing such instrument is hereby validated, ratified and confirmed." is invalid as being in conflict with Article I, Section 13, of the Constitution of 1945; that there are no constitutional objections to Section 1, the rest of Section 2, Section 3, Section 4 and Section 5, of Senate Bill No. 32, and that the unconstitutional part of Section 2 is not of such an integral part of the Act as to affect the validity of the remainder of the statute.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

COUNTY SURVEYORS: Qualifications of persons elected or appointed to the office of County Surveyor.

August 20, 1945



Honorable Phil M. Donnelly
Governor of Missouri
Executive Office
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter dated August 20, 1945, requesting an official opinion of this office and reading as follows:

"There is a vacancy in the office of County Surveyor of Jefferson County. There seems to be no one who is a surveyor who wants this position. However, the Democratic County Committee and the County Court have agreed upon Ben Lucas for the position, although he is not an engineer. They claim that he has done considerable road work and they believe he could handle the road work all right. However, I doubt if he could do any surveying if it became necessary to have any surveying done. Please advise me if a person who is not an engineer can be appointed as county surveyor."

The only qualifications of persons elected or appointed as county surveyors appear in Section 13190, R. S. Mo. 1939, which reads, in part, as follows:

"At the November election in the year 1868, and every four years thereafter, the qualified voters of each county shall elect some suitable person as county surveyor, * * * * *

From the above it is apparent that no set qualifications have been promulgated by the General Assembly with respect to persons elected or appointed as county surveyor. That such omission to definitely set out such qualifications was intentional is further indicated by the provisions of Section 13697, R. S. Mo. 1939, reading, in part, as follows:

"When a new county is established, the governor shall appoint * * * six suitable persons, residents of such new county, one to act as sheriff, one as county collector, one as county treasurer, and one as prosecuting attorney, one as county surveyor, and one as coroner thereof. * * * * *

It seems to be the declared intention of the General Assembly that in each instance the qualifications of the person elected or appointed as county surveyor is to be determined by the "suitability" of such person.

"Suitable" is defined in Webster's New International Dictionary, Second Edition, Unabridged, as follows:

"That is suited to one, one's needs, wishes, or condition, the proprieties, etc., appropriate; * * * * *

We, therefore, must necessarily look into the duties imposed upon county surveyors in order to ascertain the qualifications which would render a prospective appointee "suitable." Among the duties imposed upon county surveyors are those connected with land surveying. These duties arise in connection with the establishment of land boundaries; the restoration of lost or decayed section corners; the admeasurement of dower; the partitioning of real property; the surveying of road locations - to name only a few. It, therefore, is quite clear that a person who is not qualified to do land surveying would not be a "suitable" person to discharge the duties imposed by statute upon the county surveyor.

We believe that the matters mentioned above are such as to preclude the appointment of some person unable to discharge the duties enumerated as county surveyor. While we are unable

to find any appellate court cases construing the term "suitable" as used in connection with qualifications for the office of county surveyor, yet we do find cases construing analogous statutes relating to the appointment of executors and administrators. In both Section 7 and Section 43, R. S. Mo. 1939, relating to such executors and administrators, the terms "suitable" and "unsuitable" are used. In construing these statutes our courts have repeatedly held that any inherent disabilities which would prevent the administrator or executor from faithfully and impartially discharging the duties imposed upon them under the general administration statutes have the effect of rendering such persons unqualified. We direct your attention to a portion of the opinion in Arrington v. McCluer, 34 S. W. (2d) 67, 1. c. 71, which reads as follows:

"That Miss Arrington and her counsel believed she would likely be denied appointment as executrix unless she renounced her hostile claim to the Mellon building is more than probable. And unless she so renounced she should not have been appointed because so long as she thus claimed as her own property which the will directed should be sold and the proceeds distributed otherwise, she was not a suitable person to execute the will and not entitled to letters testamentary. This appears self-evident, and it has been properly held that persons asserting or claiming interests hostile to such a trust are not suitable persons to execute the trust. See In re Estate of Padgett, 114 Mo. App. 307, 89 S. W. 886; Davis v. Roberts, 206 Mo. App. 125, 226 S. W. 662 and cases cited (executor claiming property adversely to the estate); State to use of Miller's Adm'r, v. Biddlingmaier, 26 Mo. 483. The statute, section 11, Rev. St. 1919, gave her the right, she having been thereto nominated in the will, to have letters testamentary granted to her unless she were shown to be an unsuitable or improper person to execute the will, which she was so long as she asserted ownership of the property in dispute. * * * * *

August 20, 1945

Upon the principles enunciated in the case cited and those mentioned, we believe that the ability to discharge the duties imposed upon an officer is a prime requisite for appointment to such office.

CONCLUSION

In the premises, we are of the opinion that a person who is not qualified to do surveying and who is thereby unable to discharge all of the duties imposed upon the office of county surveyor is not a suitable person for appointment to the office of county surveyor.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:CP

PARDON AND PAROLE: Six questions regarding authority of the Governor, Board of Probation and Parole, and Board of Penal Commissioners to issue commutations, paroles, or pardons to inmates at the Missouri Training School for Boys, Industrial Home for Girls, and Industrial Home for Negro Girls.

December 13, 1945



Honorable Phil M. Donnelly
Executive Office
Jefferson City, Missouri

Dear Governor Donnelly:

Receipt of your request for an opinion is hereby acknowledged. Your request reads as follows:

"I would appreciate your giving me an informal opinion on the following questions:

- "1. Does the Governor have any authority to issue a commutation, parole or pardon to an inmate at the Missouri Training School for Boys, at Boonville, the Industrial Home for Negro Girls, at Tipton, and the Industrial Home for Girls, at Chillicothe? Should the question of their release from these Institutions be submitted to the Governor for approval or rejection?
- "2. Under what authority does the Board of Probation and Parole release inmates of these three Institutions on commutation or parole?
- "3. Is it necessary for an inmate at these three Institutions to have to earn a certain number of credits or merits before he or she is eligible for consideration for commutation or parole, or has the Board of Probation and Parole the authority to issue a commutation or grant a parole regardless of

the number of credits or merits that an inmate has earned?

- "4. Does the Board of Penal Commissioners have anything to do with the granting of a commutation or parole to an inmate of either of these three Institutions? Does the Board of Penal Commissioners have anything to do with the making of the rules and regulations for the release on commutation or parole of an inmate at these three Institutions?"

With respect to the first question presented, the Constitution of Missouri of 1945, in Article IV, Section 7, provides:

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole."

With reference to the Governor's authority to parole, we note the last sentence in this section in particular to determine what its effect may be. A parole is defined in 46 C. J. 1183, Sec. 6, as:

" * * * the conditional release of a convict, before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole."

Prior to the adoption of the new Constitution of Missouri in 1945, the power to pardon included the power to parole. It is held in the case of State v. Asher, 246 S. W. 911, 1. c. 913:

"In the case of Fuller v. State, 122 Ala. 32, loc. cit. 37, 26 South. 146, 45 L. R. A. 502, 82 Am. St. Rep. 1, the court had before it a similar question. The Constitution of Alabama provides that 'the Governor shall have

power * * * after conviction, to grant * * * pardons.' The court said:

"It is the settled law that this grant includes power to grant conditional pardons, the condition to be either precedent or subsequent, and of any nature so long as it is not illegal, immoral, or impossible of performance; and that a breach of the condition avoids and annuls the pardon."

"To the same effect was the holding in Kennedy's Case, 135 Mass. 48. Chief Justice Marshall in the case of U. S. v. Wilson, 7 Pet. (U.S.) 160, 3 L. Ed. 640, defined a pardon as:

"An act of grace, proceeding from the power invested with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed."

"The power to pardon includes the power to parole (In re Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L.R.A. 858.

"It must follow from the foregoing that a parole is a conditional pardon, and that a 'parole' given by the Governor is but an exercise of the power vested in him by the Constitution and statute with respect to the issuance of conditional pardons. * * * "

A commutation is defined in 46 C. J. 1182, Sec. 4, as

" * * * the change of a punishment to which a person has been condemned to a less severe one."

It is held in the case of Ex Parte Webbe, 30 S. W. (2d) 612, 1. c. 615 (Mo.):

" * * * Section 8 art. 5, of the Missouri Constitution, empowers him (the governor) to grant commutations 'upon such condition and with such restrictions and limitations as he may think proper.' Relative to commutations, in 20 R.C.L. at page 530, it is said:

"A commutation is the substitution of a less for a greater punishment, by authority of law, and may be imposed upon the convict without his acceptance, and against his consent. In this respect it differs from a pardon to the validity of which acceptance is essential. The power to commute a sentence is a part of the pardoning power and may be exercised under a general grant of that power."

"See Biddle, Warden v. Perovich, 274 U. S. 480, 47 S. Ct. 664, 71 L. Ed. 1161, 52 A. L. R. 832. Also commutation is thus defined in Black's Law Dictionary: 'Commutation of a punishment is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit's benefit.'"

Concerning a conditional pardon, 46 C. J. 1182, Sec. 3, states:

"A pardon is conditional where it does not become operative until the grantee has performed some specified act, or where it becomes void when some specified event transpires."

For all intents and purposes, therefore, it is our notion that what could have been accomplished by paroles may also be accomplished at the present time by commutations or pardons, conditional or otherwise.

The constitutional provision does not make reference to any particular institution in which a convict may be incarcerated in order to be eligible to receive a "commutation, parole, or pardon," although it does state that there must have been a "conviction." In that event, it does not follow that the Governor has the authority to issue a commutation, pardon, or conditional pardon to an inmate at a training or industrial school where one was committed for juvenile delinquency, since a judgment of delinquency is a civil judgment and not a conviction of crime. The case of State v. Trimble, 63 S. W. (2d) 37, 1. c. 39, 333 Mo. 888, holds:

"Section 14136 R. S. Mo. 1929 (Mo. St. Ann. Sec. 14136) provides: 'Any disposition of any delinquent child under this article, or

any evidence given in such cases shall not in any civil, criminal or other cause or proceeding whatever in any court be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this article.'

"This proviso clearly indicates that any disposition of a case in a juvenile court shall not be considered a conviction of crime. It protects the child, in that the adjudication of delinquency cannot be later referred to in any proceeding, either civil or criminal, except in a subsequent case in the juvenile court. A conviction of crime under the law may always be used against a person in either civil or criminal cases. This court in banc in State ex rel. v. Buckner, supra, 300 Mo. 359, 254 S. W. loc. cit. 181 (3,5) said:
'A proceeding under the act, the aim of which, as in this case, is the exertion of the state's power, *parens patriae*, for the reformation of a child and not for his punishment under the criminal law, is not a criminal case, and the constitutional guarantees respecting defendants in criminal cases do not apply. This is obviously true and is the rule of the decisions.' (Italics ours.)"

However, with regard to those persons who are convicted of crime and committed to one of these institutions referred to, the Governor is granted authority to issue a commutation or pardon, conditional or otherwise.

Regarding the second question presented in paragraph 1 of your letter, Section 9160, R. S. Mo. 1939, provides:

"The Board of Probation and Parole shall have authority and it shall be its duty to study prisoners committed to State correctional and penal institutions to select prisoners to be recommended to the Governor for parole, commutation of sentence, or pardon; to provide for applications for paroles, commutations of sentence, and pardons; to investigate the merits of such application; to make recommendations to the Governor relative to paroles, commutations of sentence, and pardons; to recommend conditions deemed by them advisable

in the case of prisoners whose release on parole, commutation of sentence, or conditional pardon is recommended; to provide for the supervision of persons released on parole or conditional pardon; and to recommend to the Governor the revocation of paroles or conditional pardons when their conditions have been violated. Said Board shall keep and preserve complete files, and records of all prisoners held in or released from state penal and correctional institutions and the recommendations made by them relative to such prisoners. The Board may adopt rules and regulations relative to the eligibility of prisoners for parole. The Board of Probation and Parole may, at the written request of the judge or judges of a court named in Section 1 of this Act, or a board of parole authorized to serve such court, authorize parole officers appointed by said Board to act as probation officers for such court or board of parole."

Under this section, the Board of Probation and Parole has the authority and duty to study and select prisoners to be recommended to the Governor for parole, commutation of sentence, or pardon. At the same time, however, it does not appear that the Governor has the exclusive power of parole, commutation of sentence, or pardon.

In support of this, which also answers the question presented in paragraph 2 of your letter, we submit that the authority under which the Board of Probation and Parole releases inmates of these three institutions on commutation or parole is Section 9157, R. S. Mo. 1939, which provides:

"There is hereby created and established a Board of Probation and Parole. The powers and duties relative to paroles, commutations of sentence, pardons, and reprieves, now vested in the Commissioners of the Department of Penal Institutions and the Intermediate Reformatory Parole Board are hereby vested in the Board created and established by this Article. Said Board shall be deemed a continuation of the Department of Penal Institutions and the Intermediate Reformatory Parole Board in so far as the Commissioners of that Department and the Intermediate Reformatory

Parole Board are empowered to act in relation to investigations, paroles, commutations of sentence, and pardons, and all matters pending before such Commissioners and the Intermediate Reformatory Parole Board in connection with paroles, commutations of sentence, and pardons shall be carried on and completed by the Board created in this Article."

While the statutes vesting the powers of parole and commutation in the Department of Penal Institutions were not reenacted when the present Parole Board was created, they are nevertheless still effective because of the language of Section 9157, R. S. Mo. 1939, supra, and are as follows:

Section 8353, R. S. Mo. 1929, provides:

"Said board shall have power to permit any person committed to said institution to return to his home and to release him temporarily from confinement in said institution, but not from its control and supervision; but such permit shall be conditioned upon his continued good conduct during the remainder of the term for which he was committed to such institution. Such person shall under rules adopted by said board report to said board from time to time during the term for which he was sent to said institution, and said board shall have power to cause the return of any person to serve the time for which he was committed whenever his conduct during his permit shall make it necessary or proper in the opinion of said board to do so. The superintendent or any other officer of the institution shall have authority to apprehend and return to said institution any person whom the board may direct to be so returned. No parole shall be granted by the court or judge thereof to any person committed by such court to such institution after he shall have been received into the Missouri reformatory."

Section 8369, R. S. Mo. 1929, provides:

"Said board may, whenever they deem any of the inmates of said home, who have been so far reformed as to justify her discharge, liberate

such inmate by dismissal, upon parole, or release her to any suitable person who will bind her in household work or in some proper art or trade, or said board may return said girl to her parents or other guardian, if they are of good moral character, or said board may place any such girl in the charge and care of any resident of this state, who is the head of a family and of good moral character, on such conditions and on such terms as the board may prescribe."

Section 8382, R. S. Mo. 1929, provides:

"The said board may, whenever they deem any of the inmates of said home, who have been so far reformed as to justify her discharge, liberate such inmate by dismissal, upon parole, or release her to any suitable person who will bind themselves in a suitable written instrument to educate said girl and instruct her in household work or in some proper art or trade, or said board may return said girl to her parents or other guardian, if they are of good moral character, or said board may place any such girl in the charge and care of any resident of this state who is the head of a family and of good moral character, on such conditions and on such terms as the board may prescribe."

Section 9157, R. S. Mo. 1939, supra, was adopted June 24, 1937, at which time the "powers and duties relative to paroles, commutations of sentence, pardons, and reprieves," with respect to the three institutions involved, were transferred to the present Board of Probation and Parole. Sections 8353 and 8382, R. S. Mo. 1929, supra, were repealed May 12, 1939, and Section 8369, R. S. Mo. 1929, supra, was repealed May 11, 1939. It was these sections which prescribed the powers formerly held by the Commissioners of the Department of Penal Institutions. The effect of such action is found in 59 C. J. 937, Sec. 548, where it is stated:

"A statute which refers to and adopts the provisions of a prior statute is not repealed or affected by the subsequent repeal of the prior statute. In such case, the incorporated provisions, considered as a part of the second statute, continue in force and are unaffected by the repeal."

In the case of *Crohn v. Telephone Co.*, 131 Mo. App. 313, 1. c. 320, it is stated:

" * * * In Endlich on Interpretation of Statutes, section 85, it is said: 'An act adopting by reference the whole or a portion of another statute, means the law as existing at the time of adoption and does not adopt any subsequent addition thereto or modification thereof.' This rule is generally recognized. (Sutherland on Statutory Construction, section 257; 26 Am. and Eng. Ency. of Law (2 Ed.), 714; *Postal Tel. Co. v. Railroad*, 89 Fed. 190; *Jones v. Dexter*, 8 Fla. 276; *Culver v. People*, 161 Ill. 96; 43 N. E. 812; *Darmstaeter v. Maloney*, 45 Mich. 821, 8 N. W. R. 574; *Matter of Main Street*, 98 N. Y. 454; *Commonwealth v. Kendall*, 144 Mass. 357; *Gaston v. Lamkin*, 115 Mo. 20.) Further it is said by the same author (section 492): 'Where the provisions of a statute are incorporated by reference in another (where one statute refers to another for the powers given or rules of procedure prescribed by the former, the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute; and if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statute, obviously continue in force, so far as they form part of the second enactment.'

* * * "

So it may be seen that although these sections were repealed, they still are effective in determining the authority of the present Board of Probation and Parole. Therefore, in answer to the second question in paragraph 1, it is our opinion that the question of the release of an inmate need not be submitted to the Governor for his approval or rejection if the Board itself undertakes to release an inmate from either of these three institutions. Further, with regard to the question presented in paragraph 2, the authority of the Board of Probation and Parole is found in Section 9157, R. S. Mo. 1939, as outlined above.

With regard to the questions presented in paragraph 3, the only statutory provision which may be classified as a condition precedent to the parole or release of inmates of the State Industrial Home for Girls is found in Section 8369, R. S. Mo. 1929, supra, and of the State Industrial Home for Negro Girls is found in Section 8382, R. S. Mo. 1929, supra, both provisions being identical, and reading as follows:

" * * * whenever they (the Board) deem any of the inmates of said home, who have been so far reformed as to justify her discharge, * * *." (Emphasis ours.)

There is no such restriction with regard to the Missouri Training School for Boys. If the Board of Probation and Parole has established such a scheme of credits or merits, the scheme would be ineffectual against the authority of the Governor to issue a commutation or pardon, and the Board could also alter or do away with such scheme in the event it so desired.

We can find no constitutional or statutory provision which would require an inmate to have to earn any number of merits or credits before being eligible for consideration for a commutation or parole.

The authority of the Board of Penal Commissioners to grant a commutation or parole to an inmate of either of these three institutions, anticipated by the fourth paragraph of your letter, was transferred by Section 9157, R. S. Mo. 1939, supra, to the Board of Probation and Parole, and, therefore, it no longer possesses such authority. The Board of Probation and Parole is vested with the powers and duties relative to paroles, commutations of sentence, pardons, and reprieves concerning these three institutions. There is no statutory provision which would grant to the Board of Penal Commissioners the authority to do anything with the making of the rules and regulations for the release on commutation or parole of an inmate at these three institutions.

CONCLUSION

It is, therefore, the opinion of this department that the Governor has authority to issue a commutation or pardon, conditional or otherwise, to an inmate at the Missouri Training School for Boys, the Industrial Home for Girls, and the

Industrial Home for Negro Girls, when such inmate is being held under a conviction of crime. Further, that the question of the release of an inmate may be submitted to the Governor for approval or rejection, although the submission of such question is not required by statutory or constitutional provision.

We are of the further opinion that the Board of Probation and Parole is authorized to release inmates of these three institutions on commutation or parole, by virtue of Section 9157, R. S. Mo. 1939.

We are of the further opinion that it is not necessary for an inmate at these three institutions to have to earn a certain number of credits or merits before he or she is eligible for consideration for commutation or parole, when the Governor exercises such authority, and that if such a scheme of credits or merits has been established by the Board of Probation and Parole, said Board may also alter or do away with such scheme in the event it so desires.

We are of the further opinion that the Board of Penal Commissioners has nothing to do with the granting of a commutation or parole to an inmate of either of these three institutions, nor does said Board of Penal Commissioners have anything to do with the making of the rules and regulations for the release on commutation or parole of an inmate at these three institutions.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

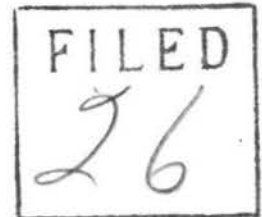
JMA:HR

ELECTION: Precincts cannot be consolidated nor canvass lists omitted in Kansas City for Special Constitutional Election on February 27, 1945.

XXXXXXXXXXXX
XXXXXXXXXXXX

January 12, 1945

J. E. Taylor
Attorney General



Board of Election Commissioners
County Courthouse
Kansas City (6), Missouri

Gentlemen:

This will acknowledge receipt of your letter of recent date, followed by your telegram of the 11th, in which you request an opinion of this Department upon the following questions:

(1) Can the Board of Election Commissioners consolidate two or more precincts at the Special Election to be held on February 27, 1945, at which election the proposed new Constitution of Missouri will be submitted to the electors of Missouri?

(2) Can the Board of Election Commissioners of Kansas City dispense with a clerks' canvass and the printing of registration lists for the Special Election to be held on February 27, 1945, at which election the proposed new Constitution of Missouri will be submitted to the electors?

Section 3 of Article 15 of the Constitution of Missouri empowers a Constitutional Convention to determine the manner in which a proposed new Constitution shall be submitted to the electors. The Constitutional Convention of 1943 - 1944, exercised the aforesaid power by passing an ordinance entitled "Manner of Holding Election Submitting the Proposed Constitution of Missouri to the Electors and Fixing the Date of Said Election", as appears by the Journal of said Convention for September 29, 1944. One of the provisions of said ordinance reads as follows:

"Said election shall be held and said qualified electors shall vote at the usual places of voting at general elections in the several counties of the State, including the City of St. Louis * * *"

Said ordinance further provided that except as therein otherwise provided, said election should be conducted according to the laws in force on said date regulating general elections.

From the foregoing, it will be seen that the Constitutional Convention has ordained that the electors shall vote at the usual places of voting at general elections. This provision, we think, would preclude the consolidation of two or more precincts because if precincts were consolidated the electors could not vote at the usual places of voting at a general election.

We have not overlooked Section 12097 (a), page 543, Laws of 1943. However, even if said section governs an election where a whole new Constitution is submitted to the voters, as to which there might reasonably be some doubt, said section would not apply to the Special Election to be held February 27, 1945, for the reason that it was within the power and province of the Constitutional Convention to determine the manner in which the proposed new Constitution should be submitted. The power which said Convention had, was received directly from the Constitution of Missouri. The people committed directly to that Convention such power and therefore, if there is a conflict between the method which the Convention ordained and the method which the Legislature provided might be used, the action of the Constitutional Convention would prevail. The Legislature could not take away from the Constitutional Convention a power which had been given to it by the Constitution of Missouri.

Said ordinance of the Constitutional Convention further provided that at the Special Election to be held on February 27, 1945, "every person entitled to vote under the Constitution and laws of this State shall be entitled to vote at said election". As pointed out above, said ordinance also provided that the election should be conducted, except as therein expressly otherwise provided, according to the laws governing general elections at that time. Said ordinance further provided that in cities and counties where registration of voters is now provided for by law, said Special Election should be held in accordance with the provisions of law now in effect applicable to holding general elections in said cities and counties.

If the election is to be held according to the general election laws, then every step in that election should be held in accordance with such laws. In Kansas City, one step in an election is the registration of voters, as provided for by Article 23, Chapter 76, R.S. Mo. 1939, and the election cannot legally be held without first determining who is entitled to vote at such election. In order to make such determination, the law has provided that certain steps be taken by way of registration and listing of the qualified voters. One of those steps is provided by Section 12121, which provides for verifying the registration lists by a canvass of the registered voters.

Registration is a part of the holding of the election.

Under Section 12112, persons possessing certain qualifications are authorized to vote but only in the precincts where their names are registered, and whereof they are registered as residents. The registration lists must be in the hands of the judges of election on election day (Sections 12132, 12133, 12139) and no one shall vote whose name is not on those lists (Section 12141). Registration therefore, has been made an integral part of an election in Kansas City.

There is authority supporting our position that registration is a part of an election. In *Gragg vs. Dudley*, 289 Pac. 254, 257, 143 Ok. 281, it is said:

"Section 116, vol. 9, R.C.L. p. 1113, reads in part as follows: 'An election is a process which includes registration, nomination, the voting and the manner in which the votes are to be counted and the result made known. Each of these steps must be taken in pursuance of the law existing at the time the election is had. * * *'."

Likewise, in *Holden vs. Phillips*, 132 S.W. (2d) 419 (Tex. Civ. App.), the Court held that an election was not a single event but a process.

CONCLUSION.

It is, therefore, the opinion of this Department that at the Special Election to be held on February 27, 1945, at which a proposed new Constitution for Missouri will be submitted, (1) the Board of Election Commissioners of Kansas City, cannot consolidate two or more precincts for voting purposes, and that, (2) Said Board of Election Commissioners cannot dispense with the canvass for verification of registration lists provided for by Section 12121, R.S. Mo. 1939.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HHK:ir

COUNTY CLERK: County Clerk not entitled to pay from School Funds for making loans.

January 24, 1945

1/24
FILED
26

Honorable Ather Ellis
Clerk of the County Court
McDonald County
Pineville, Missouri

Dear Sir:

This will acknowledge your letter of December 4, 1944, to this Department, in which you request an opinion on your right to have additional compensation for extra services performed in making loans of the County School Fund of your County. Your letter states:

"Yesterday the County Court of this County made an order allowing me \$25.00 monthly for taking care of the County School Loans. They feel that there has been a lot of additional work added by the new Law governing the granting of new loans.

"I would like for you to write me your opinion on this before I accept the money. I will be paid out of the Loanable School Funds."

Section 8 of Article XI of our Constitution covers the question of County School Funds. That section in part states:

"All moneys, stocks, bonds, lands and other property belonging to a county school fund, * * * shall be paid by persons as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund; the income of which fund shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State."

Sections 10376, 10384, 10385 and 10386 of Article 2, Chapter 72, R.S. Mo. 1939, were repealed by the Legislature of 1943, and new sections known as 10376, 10384, 10384a, 10384b, 10385 and 10386, Laws of 1943, page 880, were enacted in lieu thereof. Section 10376 contains the same language as above quoted from Section 8, Article XI of the Constitution. For the sake of brevity, Section 10376, Laws of 1943, page 880, is not quoted, but a comparison of that section with the constitutional provision above referred to will disclose that so far as safe-guards are concerned, for the faithful preservation of the school fund of the several counties of the State, they are practically identical.

The Constitution, the Statutes and the decisions rendered by our Supreme Court all disclose that the school fund of the several counties is looked upon both by the Legislature and the Courts with a jealous eye and strong terms both in the Statutes and in the decisions of the Courts are indulged in for its absolute preservation, and its appropriation can be made only for school purposes.

The question of the security required and demanded on a school fund loan and the care, caution and fidelity to their trust in the conduct of the County Court in making such loans was before our Supreme Court in the case of Saline County et al. v. Thorp et al., 88 S.W. (2d) 183. On this question the Court, l.c. 186, said:

"* * * It must be remembered that this is a case where public officers were acting for a governmental subdivision of the state, a county, in relation to funds held in trust for the public for school purposes. Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but as special trustees with every limited authority, and that every one dealing with them must take notice of those limitations. *Montgomery County v. Auchley*, 103 Mo. 492, 15 S.W. 626."

The case of *Montgomery County v. Auchley*, 103 Mo. 492, cited in the above *Saline County* case, was before the Supreme Court. The Court in holding that the County Court is a trustee of the school fund, l.c. 502, said:

"* * * The solution of this question will depend largely upon the power of the county courts in regard to school funds. That they are simply trustees of these funds will not be disputed. All powers they possess in regard to them are derived from the statutes. * * *"

The question of whether the County Court had the power to delegate to another the right to pass upon and determine the value of any security given to secure a school fund loan was discussed by the Court. That matter is not involved in your letter but what the Court said about such right of the County Court to delegate that power bears upon the whole question of the strictness to which the Courts hold the County Courts of the State in the performance of their duties in making school fund loans. The Court in holding that the County Court had no such power, l.c. 506, in the Montgomery County case, said:

"* * * We would regard it as hazardous to lay down the doctrine that county courts may delegate the power to approve a loan and the security for a loan. If they can delegate this power to the prosecuting attorney, they can delegate it to anybody, not under oath, whether responsible or not, whether discreet or not, and if the bars should be thrown down thus, it would not be long till there would be no trust funds to be loaned."

There are numerous cases in this State in which our Supreme Court has held that the County School Fund of the several counties of the State is a trust fund and that the County Courts are held strictly to the exercise of such authority in respect thereto as is given by the Statutes. In the case of Morrow v. Pike Co., 189 Mo. 610, l.c. 622, the Supreme Court said:

"* * * It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the lawmaking power in relation to the fund (Ray County to use v.

January 24, 1945

Bentley, 49 Mo., l.c. 242); It may not divert the general county revenue to its protection, and, on the other hand, it can not apply the school fund to the payment of ordinary county debts.
* * *

In the case of Ray County v. Bentley et al., 49 Mo. 236, l.c. 242, in defining the duties and extent of the power of the County Court in such matters our Supreme Court said:

"* * * The County is not the owner of the fund; the title is simply vested in it as trustee, for convenience, to carry out the policy devised by the law-making power for the appropriation and distribution of the fund. In the care, management and control of the fund, the County Court acts purely in an administrative capacity, not as the agent of the county, but in the performance of a duty specifically devolved upon it by the laws of the State. There is nothing judicial in the exercise of its functions in this respect. The County Court does not derive its powers from the county, and it can exercise only such powers as the Legislature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. * * *

The Legislature of this State in 1943, repealed Section 13433, Article 2, Chapter 99, R.S. Mo. 1939, covering salaries of County Clerk,s Deputies and Assistants, etc., and re-enacted a new section in lieu thereof to be known as Section 13433, relating to the same subject, Laws of 1943, page 874. This section fixes the annual salaries of county clerks in counties having a population of 15,000 and less than 17,500, such as McDonald County appears to be from the last census, each at \$1700 for the Clerk and \$1600 for deputies and assistants. There is a proviso in said section that the Court, in all counties in this State having a population of less than 40,000, may allow a county clerk in addition to the amount herein specified for deputies' or

assistants' hire, a further sum not to exceed \$500 per annum to be used solely for clerical hire, to be determined by the County Court of such county. This section thus fixes the full annual remuneration of county clerks in counties such as McDonald County, Missouri, and does not provide for any sum or appropriation to be made to them even out of the general county revenues much less out of the school fund, and such allowances as are contained in said Section 13433, Laws of 1943, page 874, are full compensation for county clerks for all of their services of any kind whatsoever.

Before a public officer can claim compensation he must be able to point out a statute authorizing such compensation. The rule was stated in *Nodaway County v. Kidder*, 129 S.W. (2d) 857, 860, as follows:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment.
* * *"

CONCLUSION.

Considering the subject matter of the action of the County Court of McDonald County in making the order of record allowing the clerk of the County Court \$25.00 for taking care of the school loans upon which the request as to the legality thereon for an opinion herein is based, and applying the Constitution and Statutes of this State and the decisions of our Supreme Court thereto above cited, it is the opinion of this Department that said action and order of the County Court of McDonald County is not authorized by law; that said County Court cannot appropriate out of, either the principal or interest of said school fund of McDonald County, any sum whatsoever and pay it to the county clerk of McDonald County as compensation for any services he may perform or has performed in making loans of said school funds; and that the County Clerk may not lawfully accept or receive any such compensation, because under the Statutes and decisions cited and quoted, full compensation for all of his services is included in his salary fixed by law.

APPROVED:

Respectfully submitted,

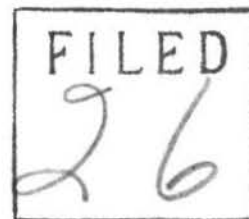
HARRY H. KAY
(Acting) Attorney General

GEORGE W. CROWLEY
Assistant Attorney General

GWC:lr

STATE FAIR GROUNDS: Repeal of clause in Section 14155, R. S. Mo. 1939, would not eliminate reverter clause from conveyance by which state acquired title.

February 1, 1945.



Honorable John W. Ellis
Commissioner of Agriculture
State Office Building
Jefferson City, Missouri

Dear Mr. Ellis:

Under date of December 18, 1944, you wrote the office of the Attorney General requesting an opinion as follows:

"I herewith hand to you a box containing abstracts of title to the State Fair property at Sedalia.

"I respectfully ask that you advise me if there is just cause for the latter part of Section 14155, which reads as follows: '... and provided further, that should the state fail for three consecutive years to hold a fair, the land thus used for state fair purposes shall revert to the parties donating it.'

"Please advise me further, if from the above mentioned abstracts, or from any other sections, or for any other reason, the above mentioned part of Section 14155 may not be repealed."

The clause of Section 14155, R. S. Mo. 1939, quoted in your letter, was reenacted by the General Assembly in 1909. Prior to that time it was a portion of the original act which authorized the holding of a state fair. This act was enacted by the Fortieth General Assembly in 1899 and was approved April 19, 1899, Laws of Missouri 1899, pages 209, 210, and herein are quoted Sections 6 and 7 of this act, as follows:

"Sec. 6. Within ten days after the passage of this act any town or city easy of access, wishing to compete for the location of this fair, can do so by delivering to the state board of agriculture an agreement signed in writing by not less than fifteen responsible men, to donate to the state of Missouri a tract of land containing not less than one hundred nor more than one hundred and sixty acres, suitable for locating a fair thereon, and the above named board shall examine each and every site so offered, and select the one which, in their judgment, will inure to the best interests of the fair and the state in general: Provided, however, that before such selection shall be made final, there shall be furnished to the state a warranty deed to the said land, and an abstract of the title thereof, which shall be examined by the attorney-general of the state, and when his written opinion that the title to the said land is good and sufficient is received by the board making this selection, the said deed shall be duly recorded and the location made permanent.

"Sec. 7. The state board of agriculture, at such time as may be determined upon by them, shall hold, annually, a fair upon the grounds selected as above provided; and at these fairs all important products of the state shall be recognized, according to merit, by premiums or rewards for excellence offered by the board of directors, out of a fund provided therefor by the legislature of the state at each biennial session thereof, or from funds that may be otherwise provided; but all parties receiving awards from excellence or merit, shall not collect the same, nor is it collectible till he furnishes to the board of directors, to their satisfaction, a complete history of how the exhibit was produced,

and all other information concerning the entry that would be of interest or benefit to the general public; and provided further, that should the state fail for three consecutive years to hold a fair, that the said lands shall revert to the parties donating it: * * * * *

It is apparent the State of Missouri invited a donation of land upon the conditions set out in the act. Referring to the abstract of title accompanying this request for an opinion, we find that by warranty deed dated September 13, 1899, and after the approval of the act authorizing the holding of a state fair, J. C. Van Riper and wife conveyed to the State of Missouri one hundred thirty-six acres of land in Pettis County, Missouri. The abstract further shows the consideration expressed in this deed to have been "for and in consideration of the sum of One Dollar and the permanent location and maintenance of the State Fair by the State of Missouri on the land hereby conveyed pursuant to the act of the General Assembly establishing a State Fair."

Obviously, this conveyance was made in accordance with the invitation of the General Assembly for a donation of land upon which to hold the state fair. This being true, the reason for the retention in Section 14155, R. S. Mo. 1939, of the clause quoted in your letter, is obvious.

Under this deed the State of Missouri has been in possession of the land, using it as a fair grounds and holding an annual fair thereon for more than forty years.

As a reason for the retention of the clause quoted has been shown, it is necessary to consider your second question. Ordinarily, any law which has been enacted by one Legislature may be repealed by a succeeding Legislature. But in the situation here under consideration it is possible the provisions of Section 15, Article II of the Constitution of Missouri would be applicable to any act attempting to repeal this clause. Said Section 15 provides as follows:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable

grant of special privileges or immunities, can be passed by the General Assembly."

An act is retrospective in operation when it impairs some vested right. *McManus v. Park*, 287 Mo. 109, 229 S. W. 211. A vested right which cannot be interfered with by retrospective law is one which it is proper for the state to recognize and protect and of which an individual cannot be deprived without injustice. *American States Water Co. v. Johnson*, 88 Pac. (2d) 770. In order to determine whether or not an act repealing the provisions of Section 14155, supra, would be retrospective, it is necessary to consider the effect of the clause in the statute and the deed by which the state took title.

The state invited a donation of land for a specific purpose. In the case of *Chouteau et al. v. City of St. Louis, et al.*, 56 S. W. (2d) 1050, "donation" is defined as an act by which the owner of a thing voluntarily transfers the title and the possession of the same without any consideration.

Under this definition, if it were not for the proviso in Section 7, House Bill 279, Laws of 1899, supra, and the language of the consideration expressed in the deed, we would have no question to determine. The deed would have effected an unqualified donation of absolute fee simple title to the state. Under the situation existing, however, it becomes necessary to determine whether we have a conveyance of absolute fee simple title, title with a limitation or a title upon a condition subsequent. No authority is needed for the statement that absolute fee simple title is full title without limitations or condition, but for definitions of title with limitations, which are sometimes called determinable fee, and title upon condition subsequent, we refer to *Washburn on Real Property*, 6th Ed., Vol. 1, page 79. This work defines an estate with limitations as one which terminates ipso facto upon the happening of the event by which it is terminated, and an estate upon a condition subsequent as one which does not terminate ipso facto but which only terminates upon the entry and taking possession by the party entitled to avail himself of the breach of the condition.

Turning to the deed to the state, we find that the deed itself does not contain either a reversion clause or

a condition subsequent but refers to the law authorizing the holding of the state fair, which law is hereinbefore set out. When a deed makes reference to some other instrument, the other instrument referred to must be read into the provisions of the deed. Corpus Juris, Vol. 18, Par. 229, page 268. Also we refer to the case of Waldermeyer v. Loebig, 121 S. W. 75 (Mo. Sup.) from which the following is quoted at l. c. 78:

"Again and again it has been ruled by this court that a deed must be read as a whole--in a word, by its four corners--and that many of the old formulas were no longer invoked by the courts. All rules of construction rest upon the principle that they were designed to ascertain the intention of the grantor and effectuate it, unless some positive rule of law would be infringed by so doing. Thus, in the recent case of Stoepler v. Silberberg (Mo.) 119 S. W., loc. cit. 421, in discussing the effect of these statutory words in a deed, it was said: 'But while these covenants are expressed in the deed, the instrument must be read and construed in the light of all its parts, and, when this is done, it is obvious that it does not attempt or purport to convey and warrant the lot itself, but only "all such right, title and interest" that Frederick Stoepler had in and to said house and lot,' etc. To the same effect is Butcher v. Rogers, 60 Mo. 138; Moore v. Harris, 91 Mo. 616, 4 S. W. 439. In Allen v. Holton, 20 Pick. (Mass.) 463, it was said: 'Every deed is to be construed according to the intention of the parties as manifested by the entire instrument, although it may not comport with the language of a particular part of it. Thus a recital or a preamble in a deed may qualify the generality of the words of a covenant or other parts of a deed.' It is familiar law that when one deed or instrument refers to another, the instrument or deed referred to becomes

thereby part and parcel of the former instrument. To all intents the two become one when we seek to find their meaning and intention. * * *

Reading the deed and the statute together we find that the estate granted was limited to revert to the donors if the state fails for three years to hold a fair upon the property donated.

In the case of *Chouteau v. City of St. Louis et al.*, decided by the Supreme Court, in Banc, 55 S. W. (2d) 299, 1. c. 302, is an excellent discussion of a condition subsequent in a deed, which is here quoted:

"While a condition subsequent may be inserted in a conveyance of lands in fee without using express terms of reverter upon the breach of such condition, if the deed in its entirety and the circumstances attending its execution demonstrate that the object of the grantors was to cause a reversion of the estate upon the subsequent happening of a lawful condition, yet no such conclusion will be drawn, if it may be avoided by any other reasonable construction of the language of the deed. This is the settled policy of the law, the reason of which is that estates once vested in fee ought not be uprooted, except upon proof of the happening of a lawful condition attached to the continuance of the estate by the terms of the deed, and further proof that it was the intention of the grantor in making the conveyance that it should revert when this condition ceased to exist."

"To the same effect, *German, etc., Church v. Schreiber et al.*, 277 Mo. 113, loc. cit. 127, 209 S. W. 914.

"In an effort to bring himself within the rule, plaintiff contends that a right of re-entry should be implied from the expressed condition in the deed and the circumstances surrounding the execution of the deed. He points to no circumstance

tending to show an intention on the part of the grantors to provide for re-entry. On the contrary, the circumstances tend to show that the grantors intended to convey the fee. They were dealing with the state under a statute, the terms of which called for a conveyance of the fee. The statement in the statute that the land donated would be used as a site whereon to erect a courthouse did not limit the estate to be conveyed. It was merely a declaration that the land donated would be used for county purposes. As stated, the grantors owned the lots surrounding the land donated. The location of the courthouse on said land would enhance the value of those lots. In the absence of authority under the statute to convey a determinable fee, or a fee on condition subsequent, the grantors imposed a confidence or trust on the land by the condition set forth in the deed. That confidence was not wholly misplaced for the courthouse was located on said land for a century. Plaintiff cites cases in which a deed or lease provided for a forfeiture. Of course, the right of re-entry is implied from a provision for forfeiture. The deed under consideration contained no such provision."

While this quotation points out the rule where there is no reversion clause, the converse of the rule is true where the deed does contain a reversion clause, as is indicated in the paragraph quoted, and as we have in a deed and statute which we are considering.

Therefore, applying the foregoing rules, the title to the one hundred thirty-six acres of land in Pettis County, conveyed by J. C. Van Riper to the state by the deed herein referred to, would revert to the donors or their heirs upon the failure of the state to hold a fair for three years in accordance with the provisions of Section 14155, supra. This right was vested by the deed and the acceptance by the state,

Feb. 1, 1945

and an attempt now to repeal the portion of the statute which is read into the deed to make the reverting clause would be a retrospective law and in conflict with the provision of Section 15, Article II of the Constitution of Missouri.

At this point it is considered advisable to mention that if due to the present war emergency the state should fail for three years to hold a fair, there is a slight possibility that a court might excuse such failure in an action to enforce the reversion (Vicksburg and Meridian R. R. Co. vs. Ragsdale, 46 Miss 458), if an action could be maintained against the state for such purpose.

Conclusion

It is the conclusion of this department that there is a valid reason for the retention of the clause in Section 14155, quoted in your letter; that by that clause and the deed by which the state acquired title to the one hundred thirty-six acres of state fair property a valid right of reversion was vested in the donors and their heirs. That portion of the statute quoted could not now be lawfully repealed.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

WOJ:EG

January 29, 1945

FILED

27

Honorable T. A. Esterly
Assistant Prosecuting Attorney
of Jasper County
Carthage, Missouri

Dear Sir:

We are in receipt of your letter of December 12, requesting an opinion from this department, which said letter is as follows:

"The County Court of this county has requested me to ask your office for an opinion as to the salary to which the Recorder of Deeds is entitled and further how many deputies the recorder may have and who may determine the number of deputies he may have, how they are appointed and how much they are to be paid.

"As you know, this county according to the last census had a population of about 78,000 with no city over 45,000. It is my understanding that the misunderstanding in this case has arisen since the repeal of certain laws by our 1941 legislature."

Sections 13498, 13499, 13500, 13501, 13502, 13503 and 13504, R.S. Mo. 1939, being Article 6 of Chapter 99, were enacted by the Legislature in 1933 as new sections and are found in Laws of 1933 at page 375.

Section 1 of that Act fixed the salary of Recorders of Deeds at \$3,200 per annum, page 376, Acts 1933. Section 1 of said Act was amended by the Legislature in 1937, Session Acts of 1937, page 442, by increasing the salary to \$4,000.

These sections, thus amended, constituted Article 6, Chapter 99, R.S. Mo. 1939. The Legislature of 1941 repealed outright said Article 6, Chapter 99, including all said sections relating to the salaries and appointment of deputies

of Recorders of Deeds in counties containing a population of from 75,000 to 90,000 inhabitants, the Act so repealing the same appearing in the Laws of 1941, page 531. The Legislature failed to enact any new sections to take the place of the sections and article repealed. The emergency clause of the repealing Act of 1941, states that said sections were repealed because the result of the 1940 decennial census of the United States was about to be published, and that the population of certain counties in the State would show a change.

The question then, of what statute, after the repeal in 1941, of Article 6, Chapter 99, R.S. Mo. 1939, if any, provides a method for the payment of Recorders of Deeds in such counties must, it seems, be determined by the construction of what was the intention of the Legislature in passing the Act of 1933, Laws of 1933, page 375, that is, whether they intended to repeal the old fee statute method of compensation to Recorders of Deeds, which was Section 11568, R.S. Mo. 1929, and whether the Legislature of 1941, in repealing the Act of 1933, which was carried into the Revised Statutes of 1939 as Article 6, Chapter 99, as aforesaid, acted upon the theory that the Legislature of 1933, had not repealed Section 11568, R.S. Mo. 1929, and that Section 11568 was still in force as providing a method of payment of said officers in counties where the offices of Recorder of Deeds and clerk of the Circuit Court are separate regardless of the question of population.

Nowhere does the Act of 1933, Laws of 1933, page 375, in terms expressly repeal any section of Article 2, Chapter 74, R.S. Mo. 1929 of which Section 11568 is a part, and which provided the old method of paying Recorders of Deeds in all counties of this State where the offices of Recorders of Deeds and Clerk of the Circuit Court are separate by permitting them to retain certain fees for their compensation. The Act of 1933 did substitute the salary method of paying Recorders in counties having a population of from 75,000 and not more than 90,000 inhabitants for the old fee method.

This, it would seem, comes strictly within the rule laid down in Crawford on Statutory Construction where this text work discusses the doctrine of repeal by implication. If repeal there was at all of Section 11568, it was by implication only, by the Act of 1933, and necessitates arriving at an understanding of the intention of the Legislature of 1933 and of the Legislature of 1941.

Crawford on Statutory Construction -- Interpretation of Laws, on repeal by implication, in Section 308, states:

"* * * The construction of the new law becomes an important consideration, since its meaning and scope will determine whether a repeal takes place, and if so, its extent. And usually one of two questions will arise: (1) whether the new law is intended as a substitute for the old; or (2) whether the new is irreconcilably inconsistent with the old, so that the former is thereby terminated. In brief, the problem will be simply to determine what is the legislative intention -- whether the old law shall cease or whether it shall be supplemented."

It surely was not the case that the Legislature of 1941, intended by the repeal of Article 6, Chapter 99, R.S. Mo. 1939, to deprive the counties of this State where the offices of Recorder of Deeds and Clerk of the Circuit Court are separate and also having 75,000 and less than 90,000 inhabitants, such as Jasper County, of all methods of paying compensation to Recorders of Deeds in such counties for their services. By the outright repeal of Article 6, Chapter 99, R.S. Mo. 1939, the Legislature apparently recognized that the Act of 1933 was passed as a cumulative substitute only for the fee method of payment of such officers in counties of 75,000 to 90,000 inhabitants, and were aware that the statute permitting the retention of fees by Recorders, Section 11568, R.S. Mo. 1929, was not intended to be repealed as to counties where the offices of Recorder of Deeds and Clerk of the Circuit Court are separate.

In other words, the Legislature of 1933 by the enactment of the new sections substituting the salary plan instead of the retention of the fees plan to pay Recorders of Deeds in counties having 75,000 and less than 90,000 inhabitants, for their services, merely exempted such counties of which class Jasper County is one, from the fee plan as provided in Section 11568, Article 2, Chapter 74, R.S. Mo. 1929, covering all counties in the State; that said Act of 1933 in no sense repealed nor did the Legislature thereby intend to repeal Section 11568, and that when Article 6, Chapter 99, 1939, was repealed in 1941, the exemption of such counties created in 1933 expired and such counties were left thereby exactly where they were under Section 11568, R.S. Mo. 1929, providing for the retention of fees for the payment for the services of Recorders of Deeds of such counties prior to the passing of the Act of 1933 by the Legislature.

Convincing evidence and circumstances to determine that the Legislature of 1933 did not intend to repeal Section 11568, R.S. Mo. 1929, lie in the fact that said section was carried into the revision of 1939 and there appears word for word as Section 13187, Article 2, Chapter 89, R.S. Mo. 1939, indicating that the Revision Committee also held the view that Section 11568 had been undisturbed by any change, amendment or repeal by implication, and that it was in full force at the time of the revision.

The language and scope of the Act of 1933 throw some light upon the question of the intention of the Legislature in passing that Act from which it may be said that it was intended only to enact new sections providing a cash method for a fee method of paying Recorders of Deeds, as an aid and substitute only for the population class of Jasper County, and that a repeal of Section 11568 was not intended. The Act of 1933, and Section 11568, R.S. Mo. 1929, were not so irreconcilably inconsistent that Section 11568 was eliminated when the new Act was passed in 1933. The last sentence of Section 1 of the Act of 1933, Laws of 1933, page 376, is as follows:

"* * * Said salaries to be in lieu of all other salaries, fees, commissions or emoluments of whatsoever kind under and by reason of the terms of any statutory provisions outside of this article."

It will be observed at once that the Legislature using the language just quoted distinctly recognized other "statutory provisions" as being in existence outside of Article 6, Chapter 99. Reading Section 6 of said Act of 1933 on page 377, Laws of 1933, we find that it did no more than make the fee mode of payment to Recorders "ineffective". Section 6, itself and the index to the sections on page 375, declare that the old statute was merely "ineffective". Section 11568, R.S. Mo. 1929, was thus designated as incomplete and inadequate or ineffective and was not rendered void or destroyed by outright repeal or by implication by the Act of 1933.

The word "Effective" is defined in Webster's Dictionary page 819, in the 6th definition, as follows:

"In actual operation; -- Said of a statute or judicial order limited by its terms to begin at a designated time."

The word "ineffective" is defined in Webster's Dictionary, page 1271, in the second definition, as: "not capable of performing the required work or duties; inefficient; incapable; as ineffective troops or workmen".

The word "ineffectual", which is a synonym of "ineffective", has been defined and distinguished from a word or words which would signify a complete setting aside, destruction or elimination of a statute, or any word which would mean an express word of repeal.

In the case of Noll vs. Alexander et al, 282 S.W. 739, 1.c. 742, the Springfield Court of Appeals had for consideration two sections of the Revised Statutes of 1919 covering the question of changes of venue involving the definite question of whether an order of change of venue vested jurisdiction in the Court to which the venue was to be transferred instantly unless bond be given, and whether the Court to which the venue was changed ever obtained jurisdiction of the person where the plaintiff, Noll, never appeared and never gave bond in the Court to which the change of venue was directed. In that case Noll had sued Alexander and others for false imprisonment. Noll lost in the Circuit Court. He appealed to the Springfield Court of Appeals. He urged that, under Section 3980, R.S. Mo. 1919, the order granting a change of venue in the case was void, and that the Court to which the change was sent did not obtain jurisdiction of his person because no bond was given at the time of the order and in the Court making the order. In its discussion of the issue and in giving effect to the terms of the statutes then being discussed, the Springfield Court of Appeals, 1.c. 742, said:

"The statute set out above does not provide that, if bond is not given, the order granting the change of venue shall be void. It merely says that the order granting a change of venue shall not be 'effectual' until bond is given. There is a vast difference in the meaning of the two words. 'Void' means of no force or validity. 'Ineffectual', as used in this statute, means without complete power to proceed to final judgment. * * *"

So here, if Article 6, Chapter 99, R.S. Missouri, 1939, which was repealed by the Act of 1941, had used the word "void" or "repealed" or some word of like meaning or import, the conclusion would be inevitable that an outright repeal of Section 11568, R. S. Mo. 1929, was intended. But the Legislature used no such word. In addition to the language

used in the last sentence of Section 1 of the Act of 1933, hereinabove quoted, and which recognized other "statutory provisions", outside of said Article 6, being in existence, the Legislature in Section 6 of that Act said:

"Sec. 6. All conflicting provisions ineffective, -- All provisions of law outside of this act, allowing any fee, compensation, or emolument to either of the before mentioned officers, to be paid out of the Treasury of any such county, or hereby declared to be ineffective as to any and all such counties, * * * "

Repeal by implication is not favored, and the presumption is always against repeal by implication where express terms are not used. The Act of 1933, Laws of 1933, page 375, did not mention Section 11568, R.S. Mo. 1929. The Legislature passed that Act as a new article, supplementing the old fee statute, and while recognizing that there were some "statutory provisions outside of this article" still in existence, it was not provided that such other laws were repealed or should be considered eliminated, but merely suspended them by saying that they were to be "ineffective" as to such counties.

These principles of law are stated and discussed by many of our text authorities and in many of our Supreme Court decisions.

59 C.J. 905, Section 510 lays down the rule as follows:

"The repeal of statutes by implication is not favored. The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication if they can avoid doing so consistently or on any reasonable hypothesis, or if they can arrive at another result by any construction which is fair and reasonable. Also, the courts will not enlarge the meaning of one act in order to hold that it repeals another by implication, nor will they adopt an interpretation leading to an adjudication of repeal by implication unless it is inevitable, and a very clear and definite reason therefor can be assigned. Furthermore, the courts will not adjudge a statute to have been repealed by implication unless a legislative intent to repeal or supersede the statute plainly and clearly appears. The implication must be clear, necessary, and irresistible. * * * "

The rule that repeal of statutes by implication is not favored by the Court is stated in the case of State ex rel. Moseley, et al. vs. Lee et al., 319 Mo. 976, l.c. 989, where the Court said:

"* * * The repeal of statutes by implication is not favored by the courts, (36 Cyc. 1071; Road District v. Huber, 212 Mo. 551, 562; State ex rel. v. Bishop, 41 Mo. 16, 24.) The question of repeal is one of intention (Curtwright v. Crow, 44 Mo. App. 563, 568), and the presumption is always against the intention to repeal by implication where express terms are not used. (36 Cyc. 1071, 1072; Gasconade County v. Gordon, 241 Mo. 569, 582; State ex rel. v. County Court, 41 Mo. 453, 459)"

The Lee case above quoted cites the case of Curtwright vs. Crow, 44 Mo. App. 563, on the rule that repeal is a question of intention. The Crow case, l.c. 568, states that rule as follows:

"But after all the question of repeal is one of intention, and where the courts can give effect to the manifest intention of the legislature, without violating any constitutional inhibition, it is their duty to do so. Where two acts are passed at the same session of the legislature, on the same subject-matter, they must be construed together. * * *"

That repeal by implication may only occur when necessity demands it is stated by our Supreme Court in the case of White vs. Greenway et al., 303 Mo. 691, l.c. 697, 698, where the Court said:

"A repeal occurs by implication only when necessity demands it. (State ex rel. v. Wells, 210 Mo. l.c. 620; Manker v. Faulhaber, 94 Mo. 440; 26 Cyc. pp. 1073-1077.) The opinion in the Wells Case quotes from a textbook, as follows:

" ' A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the

old law is repealed by implication only pro tanto, to the extent of the repugnancy.' (Anderson's Law Dict., p. 879)."

The same rule as announced in the Greenway case, *supra*, quoting Anderson's Law Dictionary, page 897, is stated verbatim in *State ex rel. v. Wells*, 210 Mo. 601, l.c. 620.

Section 13147, Article 1, Chapter 89, R.S. Mo. 1939, as amended by the Laws of 1941, page 525, requires that there shall be an office of Recorder of Deeds in each county in this State containing 19,000 or more inhabitants. Section 13155 of said Article 1, Chapter 89, provides that such Recorders of Deeds shall be elected on the first Tuesday after the first Monday of November 1934, and every four years thereafter, with other provisions therein stated. Section 13160 of Article 1, Chapter 89, 1939, provides that in all counties where the offices of clerk of the Circuit Court and Recorder of Deeds have been or may be separated, and this is the case in Jasper County, that the Recorder of Deeds may appoint in writing one or more deputies to be approved by the County Court of their respective counties, with other provisions therein contained. These sections of Article 1, Chapter 89, have not been repealed and are independent of the sections contained in Article 6, Chapter 99, which were repealed as above stated, by the Legislature in 1941, Laws of 1941, page 531. Article 2 of Chapter 89, R.S. Mo. 1939, deals with the charging and collection of fees by Recorders of Deeds. Section 13187 of said Article 2, Chapter 89, requires that the Recorder of each county in this State where the offices of the Recorder of Deeds and the clerk of the Circuit Court are separate, without reference to the population of such county, shall keep a true account of all fees received, and make a report thereof to the County Court, and that further:

"* * * and all the fees received by him, over and above the sum of four thousand dollars, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury, to form a part of the jury fund of the county."

These provisions and conditions are practically identical with Section 11568, R.S. Mo. 1929, and would apply to Jasper County.

This section, 13187, appears to cover the question of compensation for such deputies also. This same section was in our Revised Statutes of 1889 as Section 7450. The same constitutional provision then existed as now exists, Section 13, Article 9, Const., regarding the payment of salaries of deputies and assistants by a Recorder of Deeds before making settlement and turning over any excess of fees to his county. The matter of construing said terms of both the Constitution and the statute was before our Supreme Court in the case of State ex rel. v. King, 136 Mo. 309. The Court in that case, l.c. 318, 319, said:

"Under these provisions, is a recorder entitled, as a matter of right, to retain out of the fees of his office an amount sufficient to pay reasonable compensation to necessary assistants, or is the allowance left entirely to the discretion of the county court?

"The constitution is positive in its terms, and contains no words from which a discretionary power can be implied. The statute can not be given such construction as will cause a conflict with the constitution. The statute existing when the constitution was adopted would be repealed by such a construction. To give the statute effect, then, the word 'may' can not be given a meaning which could deprive the recorder of his right to an allowance for assistants if they were necessary to secure the proper and expeditious performance of the duties of the office. It is also a well recognized rule of construction that the word 'may' should be interpreted to mean 'shall' when referring to a 'power given to public officers, and (which) concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner.' Such an interpretation is demanded 'for the sake of justice and the public good.' Steines v. Franklin Co., 48 Mo. 178, quoting from Newburgh Turnpike Co. v. Miller, 5 Johns. Chy. 113."

CONCLUSION.

Considering the facts submitted, and applying the above statutes and authorities cited and quoted to them, it is the opinion of this department that by the enactment by the Legislature of 1933 of the Act that went into the revision of

1939 as Article 6, Chapter 99, Jasper County, because of its population classification, was exempted from the terms of Section 11568, Article 2, Chapter 74, R.S. Mo. 1929, which provided the retention of fees plan for the compensation of Recorders of Deeds of all counties in the State for their services, and that when Article 6, Chapter 99, R. S. Mo. 1939, was repealed outright in 1941, the exemption of Jasper County created in 1933 was removed and said county was left thereby exactly where it was prior to the enactment of Article 6, Chapter 99, R.S. Mo. 1939, in regard to the method of payment of its Recorder of Deeds for his services as authorized under the terms of said section 11568. Said section 11568, provided that said Recorder retain fees received by him up to the sum of \$4,000 for each year of his official term for his compensation and that out of the remainder of such fees and emoluments he should pay such amounts for deputies, and assistants, in his office as the County Court may deem necessary.

That the Recorder of Jasper County has the right under Section 13160, Article 1, Chapter 89, R.S. Mo. 1939, to appoint in writing, one or more deputies or assistants to be approved by the County Court of said county, and that under Section 13187, Article 2, Chapter 89, R.S. Mo. 1939, which is the same section as section 11568, R. S. Mo. 1929, such deputies or assistants as the County Court may deem necessary may be paid by the Recorder of Deeds of said County out of the fees collected by his office.

That under the decision rendered in the case of State ex rel. v. King, the Recorder may determine what is a reasonable amount to be paid his necessary deputies and assistants, and may pay the same to them out of the fees of his office before making settlement with the County Court, at which time he should be given credit therefor.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

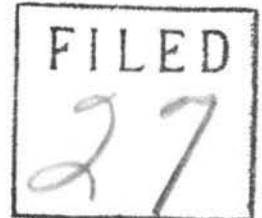
HARRY H. KAY
(Acting) Attorney General

GWC:ir

INSURANCE: Approval of increase of capital stock of the
Midwestern Fire & Marine Ins. Co., St. Louis, Mo.

February 1, 1945

Department of Insurance
State of Missouri
Jefferson City, Missouri



Attention: Honorable Preston Estep.

Gentlemen:

Your letter of January 25, requesting an opinion on the legality of the proceedings of the Midwestern Fire & Marine Insurance Company, Saint Louis, Missouri, Stockholders and Board of Directors in their proceedings to increase the capital stock of that company, has been received by this department.

Making this request your letter states:

"Enclosed herewith is a copy of the proceedings of the Directors' and Stockholders' meetings of the above mentioned company determining to increase the capital stock from \$200,000.00 to \$250,000.00, the original certified copy of such proceedings being on file in this office.

"Will you please advise this Department whether or not in your opinion the proceedings were regular and are consistent with the provisions of the laws of the State of Missouri, the Constitution of Missouri, and the Constitution of the United States?"

This department has made investigation of the laws of the State of Missouri, the Constitution of the State of Missouri and the Constitution of the United States in so far as they relate to the subject matter under consideration.

From an examination made of the certified copies of the minutes of the meetings of both the stockholders and the Board of Directors of this company they appear to be regular and to

February 1, 1945

have substantially and fairly complied with the provisions of the laws of the State of Missouri, the Constitution of Missouri, and the Constitution of the United States, and especially these proceedings appear to have complied with Sections 6026 and 6027, Article X, Chapter 37, R.S. Mo. 1939. There is nothing found in said proceedings to be inconsistent with the Constitution of this State, or the Constitution of the United States.

CONCLUSION.

It is, therefore, the opinion of this department that the proceedings of the Midwestern Fire & Marine Insurance Company at the stockholders' and directors' meetings proposing to increase the capital stock of said company from \$200,000 to \$250,000, as certified to, as required by law, and as submitted to the Department of Insurance of the State of Missouri, were and are regular and are consistent with the provisions of the laws of the State of Missouri, the Constitution of the State of Missouri and the Constitution of the United States.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

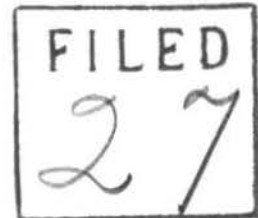
APPROVED:

HARRY H. KAY
(Acting) Attorney General

GWC:ir

TAXATION AND REVENUE: Duties enjoined upon County Collectors
under the provisions of Article 9 of
Chapter 74, R. S. Mo. 1939.

August 3, 1945



Honorable Clarence Evans, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter dated July 23, 1945,
requesting an opinion of this office, and reading as follows:

"We have been asked the following questions by Mr. Jesse E. Smith, County Collector of Greene County, Missouri, relative to the Jones Munger Law:

"Sec. 11132.

"How soon after the sale shall the Collector turn the surplus funds (surplus bids above taxes and expenses of sale) to the Treasurer? Who is the person entitled to the surplus, when may he have it and what is the effect of liens, mortgages, judgments, etc.? If the Collector has doubt as to whom he shall pay the surplus or who is entitled thereto, does he have to obtain permission from any county officer or court to transfer the money to the Treasurer or does he act on his own authority?

"Sec. 11145.

"Does the party redeeming the property have to pay the full amount of the purchase price including taxes, expenses of sale, interest and the amount of the surplus bid? If he must pay the surplus bid in addition to the taxes etc., what does

August 3, 1945

the Collector do with the additional surplus then in his hands, he also having the surplus originally paid by the purchaser or same being in the hands of the Treasurer? According to the Certificate of Redemption as supplied by the Tax Commission there is no space provided to insert the surplus, but Sec. 11145 reads 'the full sum of the purchase money named in the certificate'?

"Sec. 11159.

"How long is the Collector supposed to hold the surplus funds after sale before making a list of same and paying the surplus into the County Treasury? Does the fact that the owners of the land at time of sale are known, even though the Collector has reason to believe that because interests other than the owners in the land will prevent his claiming the surplus, mean that the Collector does not turn the surplus applying to this particular piece of land over to the Treasurer along with the balance of such funds in his hands?

"We would greatly appreciate your opinion of these sections."

In the consideration of the matters involved, we will make the same division in accordance with the three statutes referred to in your letter as you have used in your opinion request.

Section 11132, R. S. Mo., 1939

Section 11132, R. S. Mo., 1939, reads as follows:

"Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; or if he has doubt, or a dispute arises as to the proper person, the same

shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto. In case the purchaser fails to pay his bid, the land shall be again forthwith offered for sale the same as if no sale had been made, and the purchaser so failing shall forfeit and pay for the use of the distributive county school fund of the county a penalty of twenty-five per cent of the amount of his bid, to be recovered by action of debt in the name of the collector, before any justice of the peace, or court having jurisdiction, and the prosecuting attorney shall conduct such suit, and for his services a fee of five dollars shall be taxed against such delinquent purchaser."

No definite time is expressly fixed by the provisions of this statute as to when the collector shall pay the surplus to the treasurer. The general rule with respect to the time of performance of duties imposed upon an officer, where such time is not expressly fixed by the law imposing the duty, is found in *Officers*, 46 C. J., par. 305, from which we quote:

"Diligence, integrity, and intelligent discretion in the discharge of their duties are required of public officers, particularly where the rights of the public may be jeopardized by their neglect, * * *."

To the same effect is the decision in the case of *State ex rel. v. Turner*, 42 S. W. (2d) 594, 1. c. 598, from which we quote:

"Where a statute requires an act to be done, it must be performed with a reasonable degree of diligence, care, and prudence. Failure to so perform that duty is in law negligence."

August 3, 1945

This principle was again reiterated by the Supreme Court of Missouri in the case of State ex rel. v. Priest, 152 S. W. (2d) 109, 1. c. 112:

"Due diligence on the part of the clerk, of course, requires that he perform such acts as he is required to perform by law with reasonable celerity and within a reasonable time."

From the above cases, we come to the conclusion that the collector is entitled to a reasonable time after the receipt of the surplus funds by him in which to pay the same to the treasurer. "Reasonable," in the premises, would no doubt be a relative term, particularly in view of the fact that the collector is first required to pay the surplus to any person entitled thereto, and it is only when a doubt exists in his mind as to the person entitled to such surplus, or a dispute arises as to the proper person, that the collector pays the surplus to the treasurer.

In this connection, we direct your attention to Section 11159, R. S. Mo., 1939, which will be discussed more at length, infra, but which does specifically provide for the payment of the surplus to the treasurer in the event that no owner or owners, agent or agents can be found. The time in which such payment is to be made under these special and particular circumstances will be discussed in connection with that statute.

The person entitled to the surplus is the owner of the property against whom it has been sold for the delinquent taxes, subject, of course, to outstanding mortgages, judgment liens, etc. In view of the innumerable conflicts which might arise regarding the determination of the person entitled to the surplus, protection has been granted the collector by the provisions of Section 11132, which permit him, in the event of a doubt or a dispute arising, to pay the money into the county treasury, leaving the claimants to recourse to the courts for an adjudication of their rights with respect thereto.

We believe that the plain terms of the statute permit the collector, upon his own initiative, to pay the surplus to the treasurer in the event a doubt exists in the mind of the collector as to the proper person entitled to receive such

surplus. In those circumstances, we do not believe it necessary for the collector to obtain an order from the county court.

Section 11145, R. S. Mo., 1939

Section 11145, R. S. Mo., 1939, reads as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

August 3, 1945

We think the first question you have proposed with respect to this statute is answered by this portion thereof:

"By paying to the county collector, * * the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, * * * with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption."

We believe that the second question you have proposed respecting this statute is answered by the provision therein which reads as follows:

"By paying to the county collector, for the use of the purchaser, his heirs or assigns, * * *."

This discloses that all excess payments made by the person redeeming the property are to go to the original purchaser at the tax sale. There will be no duplication of surplus funds in the hands of the collector, inasmuch as the original surplus arising at the sale is required by the provisions of Section 11132, R. S. Mo., 1939, quoted supra, to be paid to the "person entitled thereto." Upon redemption, the surplus is repaid to the purchaser, his heirs or assigns, to reimburse him for the amount which he had paid at such original sale.

Section 11159, R. S. Mo., 1939

Section 11159, R. S. Mo., 1939, reads as follows:

"When real estate has been sold for taxes or other debt by the sheriff or collector of any county within the state of Missouri, and

the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff or collector of the county, when such sale has been or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the debt or taxes and all costs in the case, and for which no owner or owners, agent or agents can be found, together with the amount of surplus money in each case, which statement shall be subscribed and sworn to by the sheriff or collector making the same before some officer competent to administer oaths within this state, and then presented to the county court of the county where such sale has been or may hereafter be made; and on the approval of the statement by the court, the sheriff or collector making the same shall pay the said surplus money into the county treasury, take the receipt in duplicate of said treasurer for said overplus of money and retain one of the said duplicate receipts himself and file the other with the county court, and thereupon the court shall charge said treasurer with said amount. And said treasurer shall place such moneys to the credit of the school fund of the county, to be held in trust for the term of twenty years for the owner or owners or their legal representatives. And at the end of twenty years, if such fund shall not be called for, then it shall become a permanent school fund of the county. County courts shall compel owners or agents to make satisfactory proof of their claims before receiving their money: Provided, that no county shall pay interest to the claimant of any such fund."

We believe that your first question respecting this statute is answered by the discussion under Section 11132, supra. Here, again, the collector is charged with doing certain acts with respect to determining to whom the surplus should be paid, and under the general rule relating to the time when such acts

must be done, we believe that he would have a reasonable time within which to determine that the owner or owners, his or their agent or agents cannot be found. You will note that Section 11159 is a special statute dealing only with the situation when the owner or owners, his or their agent or agents cannot be found.

With respect to your second question, we believe that if the conditions enumerated therein are such as to create a doubt in the mind of the collector as to whom the surplus should be paid, he should proceed under the provisions of Section 11132, which permit him, in such cases, to deposit the money with the treasurer.

CONCLUSION

In the premises, we are of the opinion:

(1) That under the provisions of Section 11132, R. S. Mo., 1939, the collector has a reasonable time after the sale of lands for delinquent taxes to turn the surplus arising therefrom into the county treasury;

(2) That the person entitled to such surplus is the owner of such real property so sold, subject to the rights of the owners of existing mortgages or judgment liens, and that such surplus should be paid to the person entitled thereto within a reasonable time;

(3) That if a doubt exists in the mind of the collector as to whom such surplus should be paid, he is authorized under the provisions of Section 11132, R. S. Mo., 1939, to pay such surplus into the county treasury without the order of any court;

(4) That the person redeeming real property from sale for delinquent taxes must pay to the collector the full sum of the purchase money named in his certificate of purchase and all the costs of the sale, together with interest at the rate specified in such certificate, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and an amount sufficient to pay the costs incident to entry of recital of such redemption;

(5) That the surplus then in the hands of the collec-

August 3, 1945

tor arising by virtue of such redemption shall be paid by the collector to the purchaser at the original sale, or his heirs or assigns;

(6) That the collector has a reasonable time under the provisions of Section 11159, R. S. Mo., 1939, within which to ascertain whether or not the owner or owners, his or their agent or agents may be found, and that it is only after failing to find such owner or owners, his or their agent or agents, that the collector is required to file the statement described in Section 11159; and

(7) That if a doubt exists in the mind of the collector as to whom he should pay the surplus, he should pay such surplus into the county treasury in order that claimants thereof may establish their rights thereto in a court having jurisdiction to adjudicate such claims.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION: Authority of State Tax Commission to review and correct original assessments.

September 11, 1945



Honorable Clarence Evans, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter of September 7, 1945, requesting an official opinion of this office, and reading as follows:

"We would be greatly pleased to have your opinion as to authority of the State Tax Commission to lower the assessed value of real estate below what we know its true value to be in money - for the reason that discrimination is proved as between it and other like property, in the same County."

With respect to the question you have proposed, we direct your attention to the following statutes as being those conferring authority upon the State Tax Commission to act in the premises.

Section 11027, R. S. Mo. 1939, reads, in part, as follows:

"It shall be the duty of the commission, and the commissioners shall have power and authority, subject to the right of the state board of equalization, finally to adjust and equalize the values of real and personal property among the several counties of the state, as follows:

"(1) To have and exercise general supervision over all the assessing officers of

this state, over county boards of equalization and appeal in the performance of their duties, and to take such measures as will secure the enforcement of the provisions of this article, and all the properties of this state liable to assessment for taxation shall be placed upon the assessment rolls and assessed in accordance with the letter and plain provisions of the law.

* * * * *

"(3) To receive all complaints as to property liable to taxation that has not been assessed, or that has been fraudulently or improperly assessed, to investigate the same and to institute such proceedings as will correct the irregularity complained of, if any irregularity be found to exist.

* * * * *

"(6) * * * Said commission shall also have all powers of original assessment of real and personal property now possessed by any assessing officer, subject only to the rights given by the Constitution to the state board of equalization.

"(7) To cause to be placed upon the assessment rolls omitted property which may be discovered to have, for any reason, escaped assessment and taxation, and to correct any errors that may be found on the assessment rolls and to cause the proper entry to be made thereon.

"(8) To raise or lower the assessed valuation of any real or personal property, including the power to raise or lower the assessed valuation of the real or personal property of any individual, copartnership, company, association or corporation; Provided, that before any such assessment is so raised, notice of the intention of the

September 11, 1945

commission to raise such assessed valuation and of the time and place at which a hearing thereon will be held, shall be given to such individual, copartnership, company, association or corporation as provided in section 11028.

* * * * *

Section 11028, R. S. Mo. 1939, reads, in part, as follows:

"After the various assessment rolls required to be made by law shall have been passed upon by the several boards of equalization and prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes, the several assessment rolls shall be subject to inspection by the commission, or by any member or duly authorized agent or representative thereof, and in case it shall appear to the commission after such investigation, or be made to appear to said commission by written complaint of any taxpayer that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the said commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered, at a time and place to be stated in said order, said time to be not less than five days from the date of the issuance of said order, and the place to be at the office of the county court at the county seat, or at such other place in said county in which said roll was made as the commission shall deem most convenient for the hearing herein provided. * * * * * The commission, or any member thereof, or any duly authorized agent thereof, as the case may be, shall then and

there hear and determine as to the proper assessment of all property and persons mentioned in said notice, and all persons affected, or liable to be affected by review of said assessments thus provided for, may appear and be heard at said hearing. In case said commission, or any member or agent thereof who is acting in said review, shall determine that the assessments so reviewed are not made according to law, he or they shall, in a column provided for that purpose, place opposite said property the lawful valuation of the same for assessment. * * * * The action of the commission, or member or agent thereof, when done as provided in this section, shall be final, when approved by the state board of equalization. When any property has been reviewed, assessed and valued by the commission as herein authorized, such property shall not be assessed or valued at a lower figure by the local assessing or equalizing officer for the year the assessment is made."

In construing these statutes with respect to the authority conferred on the State Tax Commission thereunder, the Supreme Court of Missouri, in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 19 S. W. (2d) 746, 1. c. 751, said:

"From said sections 12847 and 12848 it appears: The state tax commission is given general supervision over all the assessing officers of the state, with power to enforce its orders; it has all the powers of original assessment; it may receive complaints as to property liable to taxation that has not been assessed, or that has been fraudulently or improperly assessed, and apply the proper corrective measures; it can raise or lower the assessed valuation of real or personal property either in specific instances or by class; and it has authority, on the com-

plaint of any taxpayer and after the various assessment rolls have been passed upon by the several boards of equalization, but before the delivery of the tax rolls to the proper officers for collection, to hold hearings for the purpose of determining whether any property subject to taxation has been omitted from the assessment rolls and whether any property thereon has been improperly valued, and to make such changes with respect thereto as shall be necessary to make the assessment rolls conform to the facts as found by them.

"It is no doubt true that the state tax commission was not intended to supplant local assessing officers and boards, but very clearly it is given full and adequate power, not only to supervise, but to review, their work, and where it finds assessments which were not made conformably to law to revise them--and this by inserting where necessary, after a hearing, its own valuations in lieu of those made by the local authorities. * * * "

Parenthetically, we wish to call your attention to the fact that the decision rendered in the above case was reversed on other grounds upon appeal to the Supreme Court of the United States, but that the later opinion written by the Supreme Court of Missouri, in conformity to the mandate of the decision of the United States Supreme Court, contained the following language with respect to the above quoted portion of the original opinion:

" * * * It is unnecessary to consider the powers of the state tax commission. The ruling on that question in our former opinion was not affected by the decision of the United States Supreme Court. That court fully recognized the authority of this court to overrule the case of the Laclede Land & Improvement Co. v. State Tax Commission, 295 Mo. 298, 243 S. W.

September 11, 1945

887, and to decide that the tax commission was authorized to hear and determine the complaint of plaintiff, subject to the approval of the state board of equalization. * * *

The conforming opinion from which the above quotation was taken is reported in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 42 S. W. (2d) 23.

From the foregoing, it is apparent that the State Tax Commission has the authority to review all original assessments at any time prior to the delivery of the tax rolls to the proper collecting officers, subject to the right of the State Board of Equalization to review such action.

There may be some question in your mind as to whether discrimination in the assessment of real property, if shown and proved, is proper grounds for invoking action by the State Tax Commission. This question was referred to in the case of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 19 S. W. (2d) 746, 1. c. 752, wherein the court said:

" * * * Had appellant made timely complaint to the state tax commission, the commission and the state board of equalization, to which it renders an auxiliary service, would, it must be presumed, have at once corrected the alleged discrimination in the assessments, * * * ."

Further, that discrimination is also grounds for intervention by a court of equity was declared in *Jefferson City Bridge & Transit Co. v. A. E. Blaser*, 318 Mo. 373, 1. c. 386, wherein the court said:

"However, the bill does allege that the State Tax Commission refused to levy an assessment in proportion to the value of plaintiff's property, or to assess its property in uniformity with the same class of subjects or property; that the

State Board of Equalization on reviewing such assessment refused to adjust and equalize the same; that both the State Tax Commission and the State Board of Equalization 'illegally, wrongfully and fraudulently' discriminated against plaintiff in imposing a higher assessment against plaintiff's property than was imposed against other taxable property within the State of Missouri; and that the assessed valuation of its property was arbitrarily fixed without reference to the assessed valuation of other property of the same class and kind. In ruling defendant's demurrer we must take the allegations of plaintiff's bill as true. If the persons charged with making this assessment refused to assess plaintiff's property in proportion to its value and in uniformity with all other taxable property in the State they are presumed to have known that such assessment would be in violation of Sections 4 and 3, respectively, of Article X of the Constitution of Missouri, and would result in unlawful discrimination against plaintiff's property. Their action in so refusing entered into the very concoction of the assessment. Their knowledge that an unlawful discrimination against plaintiff would necessarily follow made such action intentional on their part, and therefore fraudulent as to plaintiff. The bill meets the requirement that the fraud must be clearly stated and the constitutive facts set up. (2 Black on Judgments (2 Ed.) 583; Nichols v. Stevens, 123 Mo. l.c. 117.) In such case we do not think a complainant should be denied relief simply because the discrimination, though alleged to be fraudulent, was not systematic, habitual and against a large class of individuals or corporations. We hold that plaintiff's bill stated a cause of action."

September 11, 1945

In your letter of inquiry you have specifically referred to a situation in which the real property of a taxpayer has not been overvalued, but rather has been assessed at its true value, while other real property has been undervalued. In the premises, it is necessary to determine whether such valuation constitutes "discrimination," in violation of the Federal and Missouri Constitutions, and, if so determined, whether relief may be afforded the taxpayer by reducing such valuation to that proportion of its true value as other property in the same class.

First, as to applicable constitutional provisions, Section 1, Amendment XIV of the Federal Constitution reads, in part, as follows:

" * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 30 of Article II of the Constitution of Missouri of 1875 reads as follows:

"That no person shall be deprived of life, liberty or property without due process of law."

Section 10 of Article I of the Constitution of Missouri of 1945 reads as follows:

"That no person shall be deprived of life, liberty or property without due process of law."

Sections 3 and 4 of Article X of the Constitution of Missouri of 1875 read, in part, as follows:

"Section 3. Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

"Section 4. All property subject to taxation shall be taxed in proportion to its value: * * *"

Sections 3 and 4 of Article X, Constitution of Missouri of 1945 read, in part, as follows:

"Section 3. Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. Except as otherwise provided in this Constitution, the methods of determining the value of property for taxation shall be fixed by law."

"Section 4. All taxable property shall be classified for tax purposes as follows:
Class 1, real property; * * *

"Property in Classes 1 * * * shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class * * *."

From the above, it appears that although the Missouri cases cited hereinafter were decided under the Constitution of 1875, the reasoning therein contained remains presently applicable in the light of the retention of similar provisions in the Constitution of 1945.

There is also one statute to which we believe attention should be directed, as it might be contended that the taxpayer cannot obtain relief by way of reduction of valuation placed upon his real property, as to do so would violate such statute. We refer to Section 10981, R. S. Mo. 1939, reading, in part, as follows:

"The assessor shall value and assess all the property on the assessor's books according to its true value in money at the time of the assessment; and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation.
* * * "

Adverting to the principal question, we believe that discrimination in assessments is violative of the quoted portion of the Federal Constitution. It was so declared by the United States Supreme Court in *Sioux City Bridge v. Dakota County*, 260 U. S. 1. c. 445, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979. We quote therefrom:

" * * * 'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. * * * "

That assessment of the property of one taxpayer at its true value, while all other property of the same class has been assessed at a lower valuation, constitutes discrimination, is further declared in the same opinion, where the following language is found:

" * * * This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.
* * * "

We think the last quoted portion of the opinion also effectively answers any contention that such reduction in valuation cannot be made, in the light of the provisions of Section 10981, R. S. Mo. 1939, quoted supra.

The Supreme Court of Missouri, in Boonville Nat. Bank v. Schlottzhauer, 298 S. W. 732, specifically recognized and adopted the reasoning contained in the United States Supreme Court decision cited above, saying, l. c. 739:

"We most heartily concur in these views as to the relief to be granted, as we do in the rule that equity will grant relief under the facts given. The rule applies not only to the federal Constitution (Fourteenth Amendment) but to the uniformity constitutional and statutory provisions of the several states. * * * "

It therefrom appears that it has become settled law that assessment of property of a single taxpayer in a particular class does constitute "discrimination," and is in violation of the due process clauses of both the Federal and Missouri Constitutions, and is further violative of the equality of taxation clause of the Missouri Constitution.

Under the various decisions quoted earlier in this opinion construing the powers of the State Tax Commission, it is seen that such commission has been specifically authorized to

require all assessments made to conform to law. Such being the case, we believe that upon a proper showing of facts justifying the exercise of such authority, the State Tax Commission is authorized to act. That such relief may be afforded a taxpayer by the State Tax Commission is pointedly indicated in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 19 S. W. (2d) 746, 1. c. 751, wherein the Supreme Court of Missouri said:

"Appellant's grievance is, not that its property was overvalued, but that it was discriminated against through the undervaluation, and omission in part, of other property subject to taxation. Had it, at any time before the tax books were delivered to the collector, filed complaint with the state tax commission, that body, in the proper exercise of its jurisdiction, would have granted a hearing, and would have heard evidence with respect to the valuations complained of, and, if the charges contained in the complaint had been found to be true, the valuations placed on its property would have been lowered, or that on other property raised, the property omitted from the assessment roll would have been placed thereon, and the discrimination complained of thereby removed. The remedy provided by statute is adequate, certain, and complete."

From the language used, it seems apparent that the State Tax Commission may afford such relief as the facts may require or permit.

CONCLUSION

In the premises, we are of the opinion that the State Tax Commission has authority to review and correct original assessments of real and personal property, either by classes or specific items, at any time prior to the delivery of the tax rolls to the proper officers for the collection of the taxes, subject to the approval of the State Board of Equalization of such action so taken.

Further, we are of the opinion that upon a proper showing of facts disclosing discrimination in the valuation of a specific item of real property, the State Tax Commission may lower such valuation to conform with valuations placed upon the same class of property owned by other taxpayers, even though such original assessment may have been at the true valuation of such specific item of real property.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

TAXATION AND REVENUE:

An interest received by purchaser of certificate of purchase in first and second tax sale, and rights of purchaser of certificate of purchase at third tax sale. Section 11126, R. S. 1939, conflicts in part with Sec. 13, Art. X, Const. 1945, but is saved until July 1, 1946, by Sec. 2, Sch. 1945.

October 18, 1945

FILED

27

10/31

Honorable C. E. Ernst
Prosecuting Attorney
Gentry County
Albany, Missouri

Dear Mr. Ernst:

Receipt of your request for an opinion under the date, October 11, 1945, is hereby acknowledged, which reads as follows:

"Section 13 of Article 10 of the Constitution of 1945 is as follows:

"Tax Sales--Limitations--Contents of notices.--No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale shall contain the names of all record owners thereof, or the names of all owners appearing on the land tax book, and all other information required by law."

"Our County Treasurer is advertising first-second and third sales of real estate for delinquent taxes under the existing law, Section 2 Sch., 2, The Constitution of 1945, Page 140, Report Number 5 provides as follows:

"Effect on Existing Laws.--All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

"And I am wondering whether or not any valid and subsisting right would accrue to the purchaser of any real estate offered on first or second sale of such real estate. It occurs to me that the purchaser at the third sale would have title but I am wondering about the situation on first and second sales."

Section 11130, R. S. Mo. 1939, provides that:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed. If any lands or lots are not sold at such third offering, then the Collector, in his discretion, need not again advertise or offer such lands or lots for sale oftener than once every five years after the third offering of such lands or lots, and such offering shall toll the operation of any applicable statute of limitations. A purchaser at any sale subsequent to the third offering of any land or lots shall be entitled to the immediate issuance and delivery of a collector's deed and there shall be no period of redemption from such sales: Provided, however, before any purchaser at a sale to which this section is applicable shall be entitled to a collector's deed it shall be the duty of the collector to demand, and the purchaser to pay, in addition to his bid, all taxes due and unpaid

on such lands or lots that became due and payable on such lands or lots subsequent to the date of the taxes included in such advertisement and sale. In the event the real purchaser at any sale to which this section is applicable shall be the owner of the lands or lots purchased, or shall be obligated to pay the taxes for the non-payment of which such lands or lots were sold, then no collector's deed shall issue to such purchaser, or to anyone acting for or on behalf of such purchaser, without payment to the collector of such additional amount as will discharge in full all delinquent taxes, penalty, interest and costs."

In the case of State ex rel. McGhee v. Baumann, 160 S. W. (2d) 697, 1. c. 700, it is held that the only time there shall be no period of redemption following the sale of property for tax delinquency, is at the third sale. The case states:

"In 1939 the General Assembly made certain changes in the Jones-Munger Act by the enactment of Section 11130, Revised Statutes 1939, Mo. St. Ann. Sec. 9953a, pp. 7995-8000. One of the relators argues that this section is a legislative interpretation of the original Act. We do not think so. Section 11130 repeals and re-enacts Section 9953a of the original act. The new section provides that upon the third successive sale there is no period of redemption and the purchaser is entitled to a deed upon the payment of subsequent taxes only. Sections 11149 and 11152, which were applicable to all sales, whether on the first, second or third offering, at the time the sales were made in the instant cases, and are still applicable to sales on the first and second offering, were left unchanged by the 1939 revision. The 1939 revision made several changes in the original act, one important change being the provision in Section 11130 that upon the third successive sale no redemption period

should be allowed. Also by Section 11131 it was provided, for the first time, that the county or city can protect itself by bidding in the property, on the third sale. Taking all the changes together, we think the legislature understood and intended in the original act that the purchaser should pay prior taxes upon any tax sale, and by the 1939 revision intended to change the law only as to the sale on the third offering." (Underscoring ours)

Although it is true that no period of redemption is allowed under Section 11130, supra, the courts will, in the event of fraud, set aside the tax deed and offer relief to those in interest.

In the case of Bussen Realty Co. v. Benson, 159 S. W. (2d) 813, 1. c. 817, it is said:

"Some of the sales provided for under the Jones-Munger law do not allow redemption. In the case where the property has been offered for sale for two successive years and no sale made because of no bid equal to the amount of delinquent taxes and charges, then at the next regular tax sale the collector shall sell such property to the highest bidder, 'and there shall be no period of redemption from such sales.' Such sales are therefore final. (Sec. 11130.)

"Redemption is provided, we believe, for the purpose of affording simple and quick relief from the harshness of a summary, ex parte procedure. It is not relief afforded because of a wrong perpetrated upon a person. It affords relief from a sale valid in every particular. It is in addition to relief from a wrong. It does not displace the right of relief in equity to right a wrong, to do justice and equity, to relieve from a sale void because of fraud. There is nothing to indicate, nor is there any reason to believe, that the legislature even contemplated that such

privilege of redemption should oust or limit the right of relief from fraud of any description in the execution of the law which relief has been so long afforded in this State.

"A failure of a property owner to redeem or his failure to pay the taxes which brought about the sale does not forfeit his right to relief in equity. We have previously considered this theory in *Voights v. Hart*, 285 Mo. 102, 226 S. W. 248, 253. * * * * *

"Certainly every man should pay his taxes to support his government. If he neglects to do so he should suffer the penalty prescribed by law but only when that penalty is enforced lawfully and free from fraud, actual or constructive. If the failure to pay taxes and the failure to redeem are to bar a property owner from contesting the validity of a sale of his property for taxes, then all such sales become incontestable even for fraud. Such is not the law."

The same is true even after owners of the land did not redeem the property during the two-year period allowed following a sale at the first or second offering. *Mahurin et al. v. Tucker*, 161 S. W. (2d) 423, 424:

"* * * Defendant's position is, since plaintiffs failed to show themselves entitled to relief within the provisions of Sec. 11162, R. S. 1939, Mo. R. S. A. Sec. 11162, and failed to redeem the land under Sec. 11145, R. S. 1939, Mo. R. S. A. Sec. 11145, that the Collector's deed, under Sec. 11149, R. S. 1939, Mo. R. S. A. Sec. 11149, vested defendant with the fee simple title and plaintiffs are not entitled to relief.

"* * * The Jones-Munger law contemplates a sale for a consideration sufficient to pay the delinquent taxes, interest, and charges, Secs. 11127, 11129, R. S. 1939,

Mo. R. S. A. Secs. 11127, 11129, but if no bid sufficient therefor be received at either of the first two successive annual offerings, then at the third successive annual offering a sale to the highest bidder is authorized, Sec. 11130, R. S. 1939, Bussen Realty Co. v. Benson, Banc, 349 Mo. ___, 159 S. W. 2d 813, 817 (5), held that a consideration so grossly inadequate as to shock the conscience warranted setting aside a tax sale conducted under the Jones-Munger law. In discussing the statutory authority to sell at the first two offerings for not less than the delinquent taxes, interest, and charges and at the third successive offering to sell at the bid price, the court there said: 'Yet under either provision, if the land is sold for a grossly inadequate consideration, may a court of equity in the face of such provisions interfere to protect the owner as it has in the past? The answer is yes.' The reasoning underlying the quoted remarks, as well as other rulings therein announced, are fully developed in said opinion and need not be repeated here."

Rights of persons of certain status are preserved under Section 11177, R. S. Mo. 1939, which states:

"Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of lands for taxes (except in cases where the taxes have been paid or the land was not subject to taxation, or has been redeemed as provided by law), shall be commenced within three years from the time of recording the tax deed, and not thereafter: Provided, that where the person claiming to own such land shall be an infant, or a person of unsound mind, then such suit may be brought at any time within two years after the removal of such disability."

Therefore, it may be said that Section 11130, supra, refers only to sales concerned at the third offer, as was held in the case

of State ex rel. McGhee v. Baumann, supra.

With regard to sales at the first and second offering, Section 11145, R. S. Mo. 1939, applies:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

The purchaser at any sale shall receive a certificate of purchase as provided in Section 11133, R. S. Mo. 1939. Those who receive such certificates of purchase at the first or second sale are held by the courts to have an inchoate title to the property pending the expiration of the redemption period. The case of *Gilmore v. Hibbs*, 152 S. W. (2d) 26, so holds.

In the case of *City of St. Louis v. Koch* (Mo. App.), 156 S. W. (2d) 1, 1. c. 6, it is held that a certificate of purchase does not of itself pass title and the title remains in the owner during the period of the redemption:

"* * * Furthermore, our Supreme Court has held, under the statutes involved herein, that such a certificate of purchase at a tax sale does not of itself pass title to the land because title to the land sold for taxes remains in the owner, during the period of redemption. *State ex rel. City of St. Louis v. Baumann, Collector of Revenue*, Mo. Sup., 153 S. W. 2d 31. See, also, *Donohoe v. Veal*, 19 Mo. 331, and *Kohle v. Hobson*, 215 Mo. 213, 114 S. W. 952."

Section 11149, R. S. Mo. 1939, stipulates the period of time in which real estate sold for taxes may be redeemed:

"If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to

the lien for taxes for which said tract or lot of land was sold. In making such conveyance, when two or more parcels, tracts, or lots of land are sold for the non-payment of taxes to the same purchaser or purchasers, or the same person or persons shall in anywise become the owner of the certificates thereof, all of such parcels shall be included in one deed."

Although by the language of this statute there is a two-year period for redemption, which period is applicable only on first and second sales as hereinbefore pointed out, this period is not an absolute limitation upon the legal owner's right to redeem. In the case of *Hobson v. Elmer*, 163 S. W. (2d) 1020, 1. c. 1023, it is held:

"We must, however, also take into consideration the language of Section 11149, R.S. Mo. 1939 (Mo. R.S.A. Sec. 11149): 'If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, * * * the collector of the county in which the sale of such lands took place shall execute to the purchaser * * * a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple.'

"There is one manner and, in our opinion, only one manner in which these seemingly conflicting provisions may be harmonized. We construe them to mean that the owner of the lands has an absolute power of redemption which cannot be defeated by the purchaser during and up to the end of the two-year period. Thereafter the purchaser has a right to obtain a collector's deed at any time within the next two years by complying with the various statutory provisions, to-wit: by producing to the collector his certificate of purchase, paying the subsequently accrued taxes and legal fees

Oct. 18, 1945

and demanding his deed. If, after the end of the two-year period and before the purchaser has complied with these conditions precedent to obtaining his deed, the owner or transferee applies for a redemption and makes the required payments he thereby destroys the power of the purchaser to obtain a deed."
(Underscoring ours)

Following this first period of two years after the tax sale, during which time the holder of the certificate of purchase has an "inchoate" interest in the property, there is an additional two-year period during which such holder is considered to have an "equitable title," as is held in the case of State ex rel. Baumann v. Marburger, 182 S. W. (2d) 163, 1. c. 165:

"Under our Jones-Munger Act, the holder of a certificate of purchase, throughout the two years immediately succeeding the tax sale, is vested with an inchoate or inceptive interest in the land subject to the absolute right of redemption in the record owner in whom the title remains vested. After the two year period of absolute right of redemption, and for a further two year period, the certificate holder has an equitable title in the property with the right to call in the legal title by producing the certificate of purchase, paying certain taxes and fees, and demanding a deed. Bullock v. Peoples Bank of Holcomb, 351 Mo. 587, 173 S. W. 2d 753; Hobson v. Elmer, 349 Mo. 1131, 163 S. W. 2d 1020; State ex rel. City of St. Louis v. Baumann, 348 Mo. 164, 153 S. W. 2d 31.
* * * * *" (Underscoring ours)

From the foregoing discussion we may conclude that a purchaser of a certificate of purchase at a first or second tax sale receives no title to the property involved until the execution of the deed contemplated by the Jones-Munger law; further, that a purchaser of a certificate of purchase at a

third tax sale is entitled to a deed immediately, which vests title in him if no fraud occurred or other irregularity transpired for which a court of law may set such deed aside.

With regard to any conflict arising under Section 13, Article X, Constitution of Missouri, 1945, we quote Section 11126, R. S. Mo. 1939:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.: Provided however, that if a part or parts of any forty-acre tract or other legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof, then, as to such land or lots, such list shall be so prepared and separated. To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered. The county collector shall, on or before the day of sale, insert at the foot of such list on his record a copy of such notice and certify on said record immediately

following such notice the name of the newspaper of the county in which such notice was printed and published and the dates of insertions of such notice in such newspaper. The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list." (Underscoring ours)

Section 13, Article X, Constitution of Missouri, 1945. as set out in your letter, prescribes other provisions than Section 11126, R. S. Mo. 1939, and so far as it does the present law is in conflict.

Section 2 of the Schedule of 1945 states:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Therefore, Section 11126, supra, is still in effect and will be until July 1, 1946. Any tax sales advertised, as in Section 11126, will be effective under such advertisement until July 1, 1946.

Conclusion

A purchaser of a certificate of purchase at the first or second sale of property for delinquent taxes gets no title until, after the end of the two-year period of redemption, he receives the tax deed. A purchaser of a certificate of purchase at a third sale of property for delinquent taxes has a right to

Oct. 18, 1945

demand title immediately with no period of redemption. All tax deeds are subject to being set aside in the event of fraud being involved in the sale.

Section 11126, R. S. Mo. 1939, conflicts in part with Section 13, Article X, Constitution of Missouri, 1945, but is saved until July 1, 1946, by Section 2, Sch. of 1945.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

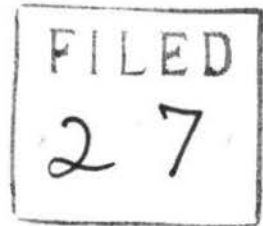
APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

CORPORATIONS: Not liable for franchise tax while charter is
forfeit for failure to make reports.

December 15, 1945



Hon. Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion under
date of October 5, 1945, as follows:

"Will you kindly furnish the State Tax Com-
mission an opinion on the following question?

"Is a corporation, whose charter was for-
feited January 1, 1941 and reinstated in
1944, liable for a corporation franchise
tax for the years 1941, 1942 and 1943, dur-
ing which time their charter was not in
good standing?

* * * * *

"We also direct your attention to a new sec-
tion No. 5125A, Laws of 1943, page 409 and
410. The latter portion of the first para-
graph leads us to conclude that perhaps lia-
bility would exist.

"This opinion is requested by reason of the
fact that a certain corporation, whose char-
ter had been forfeited and in later years
reinstated, now seeks a dissolution. No re-
ports were filed and no assessments made for
the years that the charter was not in good
standing and a difference of opinion now
exists concerning the payment of corporation
franchise tax during those years before dis-
solution can be effected."

Section 5113, R. S. Mo. 1939, which was in effect at the time of the forfeiture of the charter of the corporation described in your request, imposes a franchise tax on all corporations organized under the laws of this state or doing business in this state, based on the par value of its outstanding capital stock and surplus, in the case of domestic corporations, and on the par value of the capital stock and surplus employed in business in this state, in the case of foreign corporations.

Section 5115, R. S. Mo. 1939, requires that a report be made by each corporation on or before the 1st day of March in each year, containing information upon which the State Tax Commission or State Board of Equalization may determine the amount of franchise tax due and payable. The tax must be assessed on or before the 20th day of March, and becomes due May 15th, as provided by Section 5115, R. S. Mo. 1939. The latter section also provides that the franchise tax is paid for the calendar year, that is, the year beginning January 1st and ending December 31st following.

Since the forfeiture of the charter referred to in your request, Section 5113, R. S. Mo. 1939, was amended by Laws of 1943, page 407, and Section 5115, R. S. Mo. 1939, was amended by Laws of 1943, page 409. In addition, the Legislature enacted "The General and Business Corporation Act of Missouri," found in Laws of 1943, page 410, and as a part of said act made further provision for an annual franchise tax in Section 135, found in Laws of 1943, page 475. This section is almost identical with Section 5113 as amended. However, "The General and Business Corporation Act" does not apply to certain corporations. These laws had no bearing on the forfeiture of the charter of the corporation in question, and mention is made of these amendments only to avoid confusion. The new act was, however, in effect at the time of the rescission of the forfeiture, as set out in your request.

The franchise tax has been defined in many cases as a tax on a right or privilege. In *Missouri Athletic Ass'n. v. Delk Inv. Corp.*, 20 S. W. (2d) 51, we find the following definitions, 1. c. 55:

"The tax is not a property tax, but an excise levied upon the privilege of transacting

business in this state as a corporation.
State v. Tax Commission, 282 Mo. 213, 221
S. W. 721.'

* * * * *

"'Properly speaking, a franchise tax is one imposed only on these rights or privileges, and either consisting of a more or less arbitrary sum or measured, without appraisal, by the amount of nominal capital stock; and a tax of this character is not to be regarded as a property tax. * * * '

"'It is a tax upon the doing of business with the advantages which inhere in the peculiarities, of corporate or joint stock organizations.'

* * * * *

"'The tax is laid upon the privileges which exist in the conducting of a business with the advantages which inhere in the corporate capacity of those taxed. * * * It is this distinctive privilege which is the subject of taxation.'"

The effect of the forfeiture by the Secretary of State of the charter of a corporation under Section 5091, R. S. Mo. 1939, is described in Watkins v. Mayer, 103 S.W. (2d) 566, l. c. 569:

"'It is difficult to read the provisions of the statute without arriving at the conclusion that it was the intention of the Legislature that the act of the secretary of state should operate as a dissolution of the corporation, leaving it without corporate existence or corporate rights, privileges, franchises, or powers, subject only to the right of rescission and reinstatements, upon the application and showing required by section 4621, R. S. 1929 (Mo. St. Ann. sec. 4621, p. 2050).
* * * *

"As we pointed out in Nudelman v. Thimbles, Inc., 225 Mo. App. 553, 40 S. W. (2d) 475, 478, under section 4561, Rev. St. of Mo. 1929 (Mo.

St. Ann. sec. 4561, p. 2007), upon dissolution of a corporation, and under section 4622, Rev. St. of Mo. 1929 (Mo. St. Ann. sec. 4622, p. 2051), upon forfeiture of the certificate or license of a corporation by the secretary of state under the provisions of section 4619, Rev. St. of Mo. 1929 (Mo. St. Ann. sec. 4619, p. 2049), the officers and directors of the defunct corporation become statutory trustees and as such its legal representatives. * * *

If, therefore, the Secretary of State properly carried out the provisions of Section 5091, R. S. Mo. 1939, the corporation referred to in your request had no franchise under the laws of this state after its dissolution by the Secretary of State. Care should be exercised to see that the corporation concerned was properly notified, as required by statute, of the forfeiture of its charter, as it was held in Woodward Hardware Co. v. Fisher, 269 Mo. 271, that such notice was necessary to properly effect the forfeiture.

The effect of rescission of the forfeiture, as provided in Section 120 of "The General and Business Corporation Act of Missouri," page 472. Laws of 1943, has been discussed by the Supreme Court of California in Ransome-Crummey Co. v. Superior Court for Santa Clara County, 205 Pac. 446, where a similar provision in the California Code was under discussion. We find the following in the decision of the Supreme Court, l.c. 448:

"Furthermore, we are of the opinion that the subsequent revival of the corporate rights, powers, and privileges did not have the effect of validating the acts attempted during the period of suspension. The revival is not made retroactive by the statute. The suspension of the rights, powers, and privileges is a disability imposed on a corporation as a penalty, and it would tend to deprive the statute of its force and encourage a corporation in default to postpone payment of its taxes indefinitely, if it were held that, by subsequent payment of the delinquent taxes, all the benefits of the attempted acts denied to the corporation could be secured."

Following the authority set out above, which we believe to be sound, a rescission is not retroactive, and the corporation involved in your question was possessed of no privilege, under the laws of this state, on which a tax was due for the years elapsing between the forfeiture of its charter and its reinstatement as provided by statute.

Section 5125a, Laws of 1943, page 409, referred to in your request, is as follows:

"No corporation organized under the laws of this state shall, after March 20th, in any year, be permitted to dissolve by filing the affidavit prescribed in Sections 5037 and 5102 R. S. Mo. 1939, or by any other method provided by law, unless it shall be shown to the Secretary of State or other officer having jurisdiction over such dissolution, that it has filed the reports called for in Sections 5113 to 5125 R. S. Mo. 1939, and shall have paid to the State Treasurer any tax due upon said report. When the dissolution is to be effected by a proceeding in court, as provided for in Section 5037 R. S. Mo. 1939, or as provided in any other law, said judgment of dissolution shall be conditioned upon and shall require the annual franchise tax report to be made and the tax to be paid before the same is effective.

"No corporation, not organized under the laws of this state and engaged in business in the state shall, after March 20th, in any year, be permitted to retire from this state by filing the affidavit to that effect with the Secretary of State as provided in Section 5102 R. S. Mo. 1939, or by any other method provided by law, unless it shall be shown to the Secretary of State or other officer having jurisdiction over such retirement, that it has filed the reports called for in Section 5113 to 5125 R. S. Mo. 1939, and shall have paid to the State Treasurer any tax due upon said report."(Emphasis ours.)

In view of the holding in the Ransome-Crummey Company case, quoted supra, we believe that there was no obligation

Hon. Clarence Evans - 6

imposed by law upon the corporation to file reports while its franchise was not legally in existence, and that the reports contemplated in the above statute are those required only during the corporate existence, when a franchise is in full force and effect. Therefore, a corporation should be permitted to dissolve as set out in Section 5125a, supra, if the reports called for in Sections 5113 to 5125, R. S. Mo. 1939, had been properly filed during the period when the corporation was in possession of a valid franchise. The period during which the franchise was suspended by action of the Secretary of State should not be included in this computation,

In your request you have directed our attention particularly to the second sentence of the first paragraph of Section 5125a, quoted above. We do not believe that portion of the statute applies where a forfeiture is effected by action of the Secretary of State alone, and invite your attention to the words which we have underlined, which restrict the application of that sentence to instances in which dissolution is effected by a proceeding in court.

CONCLUSION

In view of the above, it is our conclusion that a corporation whose franchise was revoked by the Secretary of State on January 1, 1941, under Section 5091, R. S. Mo. 1939, and whose franchise was reinstated in 1944, under "The General and Business Corporation Act of Missouri," enacted in 1943, is not liable for a franchise tax for the years 1941, 1942, and 1943. It is our further opinion that a corporation seeking a voluntary dissolution after recissions of forfeiture is not chargeable with franchise taxes, and is not obliged to file reports, for the period during which its franchise was forfeit by proper order of the Secretary of State.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

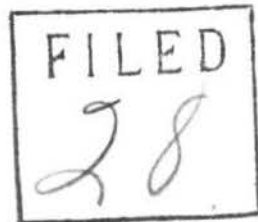
APPROVED:

J. E. TAYLOR
Attorney General

PUBLIC OFFICERS:
JUSTICES OF THE PEACE:
NEW CONSTITUTION:

Justices of the Peace elected prior to effective date of the New Constitution will continue to serve out their terms.

March 8, 1945



Honorable Roth H. Faubion
Prosecuting Attorney of
Barton County
Lamar, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 6, relative to the following question:

"Barton County does not have a population of fifteen thousand, it also has township organization. The question is, that there will be township elections on the fourth Tuesday of March, which will be a day or so before parts of the Constitution goes into effect. Under the old law Justices of the Peace would be elected on that date. The New Code does away with such officers. Under the Statutes now existing Sect. 13950 R.S. Mo., 1939, the township clerk shall transmit a list of the township officers elected within five days after such election. Sec. 13951 states that the township clerk, shall within ten days after the township election transmit to any person elected, a notice of his election. Of course there are various statutes to the effect that the County Court shall commission a Justice when their election is ascertained. What I wish to know is whether or not Justices of the Peace can be elected and qualified in the township elections on the last Tuesday in March, in Counties of this size, under township organization? It seems that the text of the Constitution and sections three and four of the 'Schedule' at the end of the Constitution are rather ambiguous."

March 8, 1945

Section 3 of Article XV of the Missouri Constitution of 1875, provides that the New Constitution shall go into force and effect at the end of thirty days after the election approving the same.

The Special Election at which the New Constitution was approved, was held on February 27, 1945, and same will become effective under the foregoing constitutional provision on March 30, 1945.

Sections 3 and 4 of the Schedule of the New Constitution provides:

"The terms of all persons holding public office to which they have been elected or appointed at the time this Constitution shall take effect shall not be vacated or otherwise affected thereby."

"All courts of common pleas now existing, the St. Louis courts of criminal correction, and all circuit court circuits as now established, shall continue until changed or abolished by law. The justices of the peace shall continue to hold their offices and receive the emoluments thereof until their terms of office expire, upon which their records shall be transferred to the magistrate courts."

Justices of the Peace at the township elections in question, on March 27, 1945, will be elected prior to the effective date of the New Constitution, and will, therefore, hold their offices until the expiration of the terms to which they were elected, in accordance with the provisions of Sections 3 and 4 of the Schedule of the New Constitution.

CONCLUSION.

It is, therefore, the opinion of this Department that Justices of the Peace elected at the township elections

Honorable Roth H. Faubion -3-

March 8, 1945

to be held on March 27, 1945, in counties under township organization, the date of which elections is prior to the effective date of the New Constitution, shall continue to hold their offices and receive the emoluments thereof until their terms of office expire, under the provisions of Sections 3 and 4 of the Schedule of the New Constitution.

Respectfully submitted,

R. WILSON BARROW
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

RWB:lr

PURCHASING AGENTS: Purchasing agents, before purchasing
PENAL INSTITUTIONS: tobacco, shall file requisition for
said tobacco with the Commission of
the Department of Penal Institutions.

June 4, 1945



Mr. Ted Ferguson
State Purchasing Agent
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"I will appreciate your rendering this office an opinion as to whether or not we are required to purchase tobaccos manufactured by the Missouri Tobacco Plant, one of the industries of the State Penitentiary, for the use of the inmates of the various state institutions, particularly those under the Eleemosynary Board. According to my understanding, these tobaccos purchased are not resold but furnished free to the patients at the various institutions."

If any law requires the state to purchase its own products manufactured by any institution of the state or give preference to such products, the State Purchasing Act shall be deemed modified to permit the purchasing agent to purchase such products of the institution or give preference in any manner as prescribed by law. Section 14601, R.S. Mo. 1939, reads:

"If any law shall provide that the state shall purchase for its own use the products manufactured by any institution of the state or shall give preference to the products of any such institution, the provisions of this chapter shall be deemed modified to

June 4, 1945

permit the purchasing agent to purchase such products or give such preference in any manner prescribed by such law."

Section 8990, R.S. Mo. 1939, indicates that before the state, or any political subdivision thereof, may purchase articles that are manufactured by the Department of Penal Institutions, from any source, the purchasing agent of the state, or of the political subdivision thereof, shall execute a written requisition to the Commission of the Department of Penal Institutions, and if said commission cannot furnish the necessary requirements they must so inform the requisitioner. Said section reads:

"The prices for all articles so manufactured, as hereinabove provided, shall be fixed and determined by said commission, and before any purchase shall be made of any said articles, for the institutions hereinabove mentioned, from any other source, written requisitions shall be made upon said commission by the proper purchasing agents of the state, or of the political subdivisions thereof, or of the trustees or managers of said institutions, for the said articles; and duplicate certificates shall be made by said commission that it is unable to furnish or supply the same within sixty days, and said requisitions and one of said certificates shall be retained and kept by the commission. Reasonable time shall be allowed for such manufacture of such articles in such requisitions, and such articles shall so far as practicable, be manufactured within a reasonable time after such requisitions are made. Said commission shall keep a permanent record of such purchases, together with prices therefor, made for any institution under the control of said commission. And no claim shall be audited or paid without such certificate. And all institutions of the state, or of any political subdivision thereof, dealing with said commission shall keep a like record of all purchases, with prices therefor, made by them from said commission or from any other source. Said prices charged by said commission shall not exceed the prices of like articles in

the open market. In case of any excess production from any of the industries before mentioned, or from any other industries now or hereafter established for the health and welfare of the prisoners, it shall be the duty of said commission to sell the same at the market price."

The Legislature has provided that said Commission of the Department of Penal Institutions shall purchase, lease or otherwise provide suitable plants, machinery and equipment, and has also provided for the purchase of material for the employment of all able-bodied persons in the State Penitentiary, with the view of manufacturing such articles as are needed by any state institutions, and the manufacture of other products which sell for a profit. Section 8988, R.S. Mo. 1939, provides in part as follows:

"Said board shall, as soon as practicable, proceed to purchase, lease or otherwise provide suitable plants, machinery and equipment, and to purchase material, for the employment of all able-bodied persons in the Missouri state penitentiary, the Missouri reformatory, the industrial home for girls, the industrial home for negro girls, or any other penal or reformatory institutions hereafter created, for such industries as in the opinion of the board will best occupy such persons, with the view of manufacturing, so far as may be practicable, such articles agreed upon by said board as are needed in any of the institutions hereinabove in this section mentioned or referred to, also such as are required by the state or political subdivisions thereof, in the buildings and offices of the institutions owned, managed or controlled by the state or political subdivision thereof, * * * * * Provided, said board may purchase or lease upon reasonable terms such machinery as may be necessary for the manufacture and production of any other articles or products that may be disposed of upon the open market at a profit to the state, including shoes, clothing, floor mats, mops, rugs, carpets and other articles of furniture, such as beds and bedding of all kinds; also desks, chairs, tables, farm implements, fertilizer, brick or any other articles agreed

upon by the board. * * * * *

Under Section 9065, R.S. Mo. 1939, the Legislature has provided that inmates may be furnished with tobacco not exceeding one pound per month to each convict. It is our understanding that a tobacco plant is conducted primarily for the benefit of inmates, in order to supply them with the tobacco as required in Section 9065. Said section reads:

"The convicts shall be clothed in the uniform prescribed by said commission, and shall receive the allowance of food prescribed by the rules, and no other; but the convicts under the care of the physician shall be allowed such diet as he may direct. The clothing and bedding of the convicts shall be of coarse material, and they shall be supplied with a sufficient quantity of wholesome food, of a coarse quality, according to the rules prescribed by the commission; and they may be furnished with tobacco, not exceeding one pound to each convict per month."

We assume that the Department of Penal Institutions is processing the tobacco which is raised into smoking tobacco. If this be true, such tobacco comes within the foregoing statutory provisions authorizing the Department of Penal Institutions to manufacture certain articles and products. In *Nashville Tobacco Works vs. City of Nashville*, 260 S.W. 449, 1.c. 451, 149 Tenn. 551, the court, in holding under an act that tobacco was an article manufactured, said:

"Sections 28 and 30 of article 2 of the Constitution and chapter 602, sec. 1, subsec. 2, Acts of 1907, contemplate two classes of commodities as exempt from taxes: (1) The direct product of the soil in the hands of the producer or his immediate vendee; and (2) articles manufactured of the produce of this state. After the product of the soil has passed from the hands of the producer or his immediate vendee, it is not exempt from taxation under section 28, supra. Before the conversion into an article of manufacture or until the artisan actually begins the process of manufacture, neither the

product of the soil nor the produce of this state are exempt from taxation under article 30, supra.

* * * * *

"Tobacco like wheat is exempt from taxation in the hands of the producer and the immediate vendee of the producer under section 28, supra. Converted into chewing tobacco, smoking tobacco, or snuff, the converted leaf, like wheat ground into flour, is exempt from taxation under section 30, supra. * * * * *"

It is a well established rule of statutory construction that in construing a statute legislative intent, if ascertainable, must be kept in mind and the whole act, or portions as are in pari materia, should be construed together. In *Holder vs. Elms Hotel Co.*, 92 S.W. (2d) 620, 1.c. 622, 338 Mo. 857, the court said:

"In construing a statute the legislative intent must be kept in mind, if it may be ascertained, and the whole act, or such portions thereof as are in pari materia, should be construed, together. * * * * *"

Another cardinal rule of statutory construction is that all statutes applicable to the subject involved must be read and construed together and, if possible, harmonized. In *State vs. Naylor*, 40 S.W. (2d) 1079, 1.c. 1084, 328 Mo. 335, the court said:

"We do not lose sight of the fact that all statutes that may be applicable must be read and construed together, and, if possible, harmonized. * * * * *"

Therefore, considering all the foregoing statutory provisions together, we are of the opinion that the legislative intent was that the purchasing agent should, before purchasing any tobacco, issue a requisition to the Commission of the Department of Penal Institutions who is manufacturing tobacco,

Mr. Ted Ferguson

-6-

June 4, 1945

and if said department has no surplus and is unable to furnish such tobacco, said department should so notify the purchasing agent who may then purchase such tobacco from some other source.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:ml

CONSTITUTION: Applicability of Art. X, Sec. 12, of the new Constitution of Missouri to counties under township organization.

March 14, 1945



Honorable Melvin E. Fish
Representative, Putnam County
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter under date of March 14, 1945, requesting an official opinion of this office, and reading as follows:

"I request an official opinion of your office upon the application of Article X, Section 12, of the new Constitution with respect to Putnam County. For your information, Putnam County operates under township organization.

"For convenience, I am dividing this request into four parts:

"(1) What body levies the tax of 35¢ provided in the first sentence of said Section 12 in counties under township organization?

"(2) By whom, and in what area, are the funds arising under such levy expended?

"(3) By what body is the levy of 35¢ provided by the second sentence of said Section 12 levied?

"(4) By whom, and in what area, are the funds arising under such levy expended?"

As there has not as yet been a judicial construction of any part of the new Constitution, we are forced to construe its terms in accordance with general rules. In doing so, we have followed the numbering you have assigned to your respective questions.

(1) We believe that this question can be best answered by quoting from the sentence mentioned, omitting the portions thereof inapplicable to counties under township organization. The sentence then reads:

"In addition to the rates authorized in section 11 for county purposes, * * * the township board of directors in the counties under township organization, * * * may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes."

It thereupon becomes clear that the township board of directors is the proper body to levy the tax provided in this part of the section.

(2) We believe that your second question is answered by the proviso contained in Section 8821, R. S. Mo. 1939, reading as follows:

"Provided, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the order of the township road and bridge fund and be used in construction and maintenance of roads * * *."

We are of the opinion that this proviso indicates an intention on the part of the Legislature that road and bridge funds arising from taxes levied on property located in the re-

spective townships outside the boundaries of special road districts shall be expended by the township board of directors of the various townships in the construction and maintenance of roads in such townships.

In this connection, your attention is directed to the provisions of Section 2 of the Schedule attached to the new Constitution, which, in our opinion, would have the effect of keeping the above proviso in force.

(3) We believe that this question is answered by a portion of the second sentence of Article X, Section 12, of the new Constitution, reading as follows:

" * * * it shall be the duty of the county court, * * * to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law."

It is clear that the county court has the duty of making the levy after authorization by a majority vote of the persons affected.

(4) The plain provisions of the quoted portion of the second sentence found in Article X, Section 12, require that all moneys arising by virtue of the additional levy be placed to the credit of the district or districts authorizing such additional levy by a majority vote. We believe that such moneys, when collected, are to thereafter be expended by the proper administrative body having charge of all funds belonging to such district or districts. Such administrative body may be the board of commissioners of special road districts, or the township board of directors, as the case may be.

March 14, 1945

CONCLUSION

We, therefore, are of the opinion that the tax levy provided in the first sentence of Article X, Section 12, of the new Constitution of Missouri will be imposed by action of the township boards of directors in counties under township organization; that the funds arising by virtue of such levy will be expended by the township boards of directors for the construction and maintenance of roads located in their respective townships, except so much of such funds as are required by law to be turned over to boards of commissioners of special road districts located therein; that the additional levy provided in the second sentence of said Article X, Section 12, will be imposed by the county court after authorization by a majority vote of the persons living within the road district affected thereby; and that such funds arising by virtue of such additional levy will be expended for road and bridge purposes by the administrative body having charge of other funds of such district.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

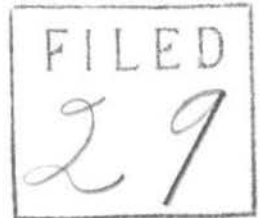
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

PRIVATE CAR TAX: RE: Officers authorized to supervise expenditure of funds allocated to counties having no township organization.

November 30, 1945



Honorable John H. Flanigan, Jr.
Assistant Prosecuting Attorney
Jasper County
Carthage, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 23, 1945, requesting an official opinion, which letter reads as follows:

"Jasper County has accumulated approximately \$3,500.00 in the fund created by the assessment of the tax contemplated by Article 15 of Chapter 74 R. S. A. Sections 11291 and 11292 contemplate that said fund should be expended for the building or repair of roads through the "Township Commissioners".

"Jasper County has no Township Commissioners and is not organized under township organization. It is my understanding that since 1935 the Jasper County Court, in conjunction with the County Surveyor, has supervised the construction and maintenance of county roads other than those under the supervision of special road districts.

"The court has asked me to request an opinion from you as to whether the court has the authority to disburse the funds above mentioned, and if so whether they are required to expend that portion of said funds in each township which said township would be entitled to under the provisions of Section 11291 above mentioned."

All counties have townships, they do not all have township organization, such is the case of Jasper County as shown in your request.

There are several well established rules of statutory construction, one is that statutes should receive a sensible construction such as will affect the Legislative intent, and if possible, so as to avoid an unjust or absurd conclusion. In the City of St. Louis vs. James Broaudis Coal Company, 137 S. W. (2d) 668, 1. c. 669(1), in approving the above rule of statutory construction the court said:

"(1) We are in full accord with appellant, that the primary rule of construction, whether of statutes or ordinances, is to ascertain and give effect to the lawmakers' intention, and that since such laws are presumably passed in the spirit of justice and for the welfare of the community, they should be interpreted, if possible, so as to further that purpose, and that frequently courts, to attain that end, look less to the letter or words of a statute or ordinance and more to the context, the subject-matter, the consequence and effect, and the reason and spirit of the law in endeavoring to arrive at the purpose of the lawgiver."

Another familiar rule of statutory construction is that the court in construing a statute will, if at all possible, construe same so as to give effect to the intent and purpose of the Legislature as expressed in said statute. In re: Costellos Estate, 92 S. W. (2d) 723, 1.c. 725, 338 Mo. 673, the court said:

* * * * *

"As the intention of the legislature, embodied in a statute is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state, to the intention or purpose of the legislature as expressed in the statute.' 59 C.J. p. 948."

Section 11290 R. S. Mo. 1939, provides that the State Auditor shall apportion to the respective counties and the City of St. Louis, the state's share of the private car tax and when this is done warrants shall be drawn upon the State Treasury in favor of the Treasurers of the various counties and the City of St. Louis, Section 11290, supra, reads as follows:

"On or before the first day of October of each year, the state auditor shall apportion to the counties and the City of St. Louis, on a basis of the number of school children in each, as shown by the last enumeration certified to the superintendent of public schools, on which the school moneys are apportioned and distributed, all of the state's portion of said money. When said apportionment has been made by the state auditor, he shall notify the county courts and the comptroller of the city of St. Louis of the amounts so apportioned, and upon requisition being made upon him, warrants therefor shall be drawn upon the state treasurer, in favor of the treasurers of the counties and the city of St. Louis. R. S. 1929, Sec. 10061."

Under Section 11291, R. S. Mo. 1939, the county courts of this state and the Comptroller of the City of St. Louis, after said private car tax is received by the treasurers of said counties and City of St. Louis, shall apportion said moneys among the various townships of their respective counties and wards of St. Louis. Section 11291, supra, reads as follows:

"When the money has been received by the treasurers of the counties and the city of St. Louis, it shall be the duty of the county courts of each county and the comptroller of the city of St. Louis to apportion said moneys among the townships of the counties and the wards of the city of St. Louis in the following manner: The said county courts and comptrollers of the city of St. Louis courts shall multiply the number of children on the last enumeration list of the school district in said townships and wards in the city of St. Louis by the ratio used by the state auditor in making the disbursements among the counties of the state and wards in St. Louis, and hold the amount due in each township and ward as a separate fund for the use of said township in the permanent construction of roads.. R. S. 1929, Sec. 10062."

Section 11292, R. S. Mo. 1939, specifically provides that said private car tax money shall be used exclusively for the construction and repair of gravel and macadamized public roads and streets and further specifies that it shall be used by the road commissioners of the various townships and the proper officers in the City of St. Louis, Missouri. Section 11292, supra, reads as follows:

"Said money shall be used exclusively by the road commissioners of the various townships and proper officers in the city of St. Louis for the construction or repair of gravel or macadamized public roads or streets, said work to be let by contract to the lowest and best bidder for so much per mile in the counties, and as seen by the proper officers of the city of St. Louis: Provided, that in counties where gravel or stone is not to be had, roads may be constructed with such other material as can be obtained for such purposes. R. S. 1929, Sec. 10063."

We are of the opinion that Section 11292, supra, clearly sets out the purpose for which said fund has been allocated, that it shall be used exclusively for the construction of roads and streets in the respective townships in each county and the City of St. Louis, Missouri. The only thing the Legislature, in passing the foregoing statutes, apparently overlooked was that all counties do not have township organization and consequently there are no road commissioners in said townships. In such case who should be authorized to use said money for the purpose for which it is allocated? We are of the further opinion that a reasonable construction to carry out the purposes of said provisions would be to allow such officers, who under the law have jurisdiction and authority to supervise and look after the construction and repair of the roads and streets in the respective townships of the county wherein no township organization is established, to carry out the purpose as evident in the foregoing statutes. It would be, in such case, either the county court, county highway engineer or road overseer. (See Article III and IX of Chapter 46, R. S. Mo. 1939.)

The Legislature is presumed to have knowledge of the laws of this state when enacting statutes. In *Graves v. Little Tarkio Drainage District No. 1*, 134 S. W. (2d) 70, 1.c. 81, the court said:

"(25) Since article 10, c. 64, R. S. 1929, was an amendment to the then drainage law we think the rule of construction announced in the case of *State ex rel. Dean v. Daues*, 321 Mo. 1126, 1152, 14 S. W.(2d)

990, 1002, applies: 'Moreover, in the construction of amendments to a statute, the legislative body, in enacting the amendment, will be presumed to have had in mind all existing, unamended and unchanged provisions and sections of the statute, and to have had in mind, also, the judicial construction given to such existing, unamended and unchanged provisions and sections of the statute by the highest court of the State. 25 R. C. L. 1067.'

There is another rule of statutory construction that might be applicable in the instant case and that is to accomplish the purpose of a statute words may be read into said statute by the court in order to convey the full intention of the Legislature. In *State ex rel. vs. Moneyham*, 212 Mo. App. 573, 1.c. 580 and 581, the court said:

"If the intent of the Legislature is reasonably clear then all grammatical errors and errors in spelling and punctuation are disregarded or corrected. The meaning of words may be limited, restricted or expanded by construction of the courts when it becomes necessary in order to make the law harmonize with reason and properly express what was in fact intended by the lawmakers in enacting the law. (*St. Louis v. Christian Bros. College*, 257 Mo. 541, 552, 165 S. W. 1057; *Stack v. General Baking Co.*, 283 Mo. 296, 410-413, 223 S. W. 89.)

"To accomplish the same purpose words omitted may be read into the statute. (Lewis' *Sutherland Statutory Construction* (2 Ed.), sec. 382; *State ex rel. v. King*, 44 Mo. 283.)

"For the same reason a word, phrase or sentence may be read out of the statute. (*State ex rel. v. Sheehan*, 269 Mo. 421, 427, 190 S. W. 864.)"

It could easily be reasoned here that since, the Legislature is presumed to know the laws in the State of Missouri, it would have knowledge that all counties do not have township organization and, therefore, in enacting Section 11292, *supra*, it apparently intended that such officers, under the law as are authorized to

supervise, construct and repair roads in such counties not having township organization should be the proper authorities to supervise the expenditure of private car tax funds allocated to said counties. That the court in construing Section 11292, supra, in order to carry out the intent and purpose of the Legislature, could very well read into said statute after the word "St. Louis" in line 4 of said statute, the following words: "and counties not having township organization".

CONCLUSION

I It is, therefore, the opinion of this department that in view of the foregoing decisions and rules of statutory construction, it was the intention of the Legislature in enacting Sections 11290, 11291 and 11292, R. S. Mo. 1939, that in those counties not having township organization the officers that are usually authorized under the law to supervise the expenditure of moneys for the construction of roads and streets in their respective counties shall be the proper authorized officials to use and expend private car tax money allocated to their respective counties, and said funds should be used exclusively for construction and repair of gravel and macadamized public roads and streets in their respective counties. Furthermore, said funds allocated to the respective counties should be used in the various townships in said county in the same proportion as allocated by the State Auditor.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

W. O. JACKSON
(Acting) Attorney General

ARH:mw

OFFICERS: County officer may be ousted for ^{willful} neglect of duties or failure to personally devote his time to duties of his office.

April 11, 1945.

FILED

31

Honorable Robert H. Frost
Prosecuting Attorney
Plattsburg, Missouri

Dear Mr. Frost:

The Attorney General acknowledges receipt of your letter of April 2, 1945, in which you make the following request for an opinion:

"At the request of the County Court of Clinton County, I would like the opinion of your office on the following set of facts.

"Our County Clerk has taken employment with a private concern and is absent from his office for as long as two weeks at a time and then is only here for one or two days at a time. Of course I realize that as long as he has title to the office he is entitled to be paid but is the fact that he does take other employment and leaves the running of the office in the hands of a deputy, sufficient grounds for an action of ouster."

The statement of facts contained in your letter is entirely too brief for this office to make a determination of whether or not a submissible case of ouster exists against the county clerk. For this reason only the applicable law can be cited, leaving to you, with your better knowledge of the facts, the determination of whether or not a submissible case exists.

Section 12828, Article 3, Chapter 83, R. S. Mo. 1939, is a general section of the statute stating grounds for the

removal of county, city, town and township officers. This section applies where there is no special section, and is as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

This has been the law for many years and under the Constitution recently adopted will remain the law until July 1, 1946, unless sooner amended if it is in conflict with the new Constitution. Section 2 of the Schedule of the Constitution of 1945 provides:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

A careful examination of the new Constitution fails to reveal any provision of it with which this law might conflict. In fact, Section 4 of Article VII, authorizes provision to be made for the removal from office of officers not subject to impeachment. Said section provides as follows:

"Except as provided in this Constitution, all officers not subject to impeachment

shall be subject to removal from office
in the manner and for the causes pro-
vided by law."

So that Section 12828, supra, might well stand without amend-
ment.

Attention is directed to one clause of Section 12828, supra, that which provides for the removal from office of an officer who fails to personally devote his time to the performance of the duties of his office. This clause follows Section 18 of Article II of the Constitution of 1875, and the Supreme Court in the case of State ex inf. McKittrick v. Wilson, 166 S. W. (2d) 499, 1. c. 502, 350 Mo. 486, points out that this section of the Constitution was intended to prevent "farming out" the duties of an office to another for the convenience and profit of the officer. This case further points out that a failure by an officer to devote his time to the performance of the duties of his office may be excusable.

In the case of State v. Yager, 250 Mo. 388, an action to oust a sheriff for neglect of duty and failure to devote his time to the performance of his duties, the Supreme Court pointed out that a willful failure to perform the duties or to personally devote his time to the performance of the duties of his office, shall constitute grounds for removal.

If, under the provisions of the former constitution, a willful failure of an officer to personally devote his time to the performance of the duties of his office, constituted grounds for removal, it follows that the same would be true of the statute which makes the same thing a cause for removal.

Further in the Yager case, supra, the Court called attention to the fact that even though the duties were properly performed by a deputy, this would not excuse a willful failure on the part of the officer. A similar holding is found in the case of State ex rel. Tilley v. Slover, 113 Mo. 202, 20 S. W. 788.

In the case of Bakersfield News v. Ozark County, 338 Mo. 519, 92 S. W. (2d) 603, the Supreme Court in discussing the failure of an officer to perform a ministerial duty, used the following language (1. c. 522, Mo. citation):

April 11, 1945

"* * * If a public officer fails to perform mandatory ministerial duties, he may be compelled to do so by mandamus. If he 'be guilty of any willful or fraudulent violation or neglect of any official duty' he may be removed from office by the method provided in Sections 11202-11209, Revised Statutes 1929. He would be subject to criminal prosecution under Sections 3945-3950 and 10187, Revised Statutes 1929. * * *"

Your attention is also directed to the cases of State ex inf. McKittrick v. Wymore, 343 Mo. 98, 119 S. W. (2d) 941; State ex inf. McKittrick v. Graves, 346 Mo. 990, 144 S. W. (2d) 91 and State ex inf. McKittrick v. Williams, 346 Mo. 1003, 144 S. W. (2d) 998.

The settled policy of the State is that an officer may not be deprived of his office except for remissness in the performance of the duties of his office or for the conviction of a crime which demonstrates that he is unworthy to hold office, and if an officer has the required qualifications he can only be removed for misconduct connected with the performance of the duties of the office, except when by statute some other transgression is made as cause for removal. State ex rel. Attorney General v. Sanderson, 280 Mo. 258, 1. c. 263.

Conclusion

From the foregoing it is the conclusion of this department that in a case not covered by a specific statute, a county officer may be removed from office for willful neglect of his duties or for willful failure to personally devote his time to the performance of his official duties. However, as previously pointed out, the statement of facts in your letter is entirely too brief for us to determine whether or not a submissible case exists against the County Clerk of Clinton County.

Respectfully submitted,

APPROVED:

W. O. JACKSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

COUNTY CLERK; Certain duties in connection with the office of county clerk.

FILED

31

April 13, 1945

Honorable Robert H. Frost
Prosecuting Attorney
Plattsburg, Missouri

Dear Mr. Frost:

Your letter of February 2, 1945, requesting an opinion of this department on eight different questions, is as follows:

"At the request of the County Court of Clinton County, Missouri, I have several questions relative to the duties and actions of the County Clerk that I wish your opinion.

"First: Does the County Clerk have authority to insert into the County Court Record Book, opinions of his own and statements in regards to advice that he gives the court.

"Second: Does the County Court have authority to order the County Clerk to strike from the records entries made by the county clerk without order from the Court.

"Third: Does the County Clerk have any authority to keep certain public records locked in private boxes where they cannot be procured for the Court when the Clerk is not present.

"Fourth: Does a County Clerk have any authority to issue beer or any other licenses without first obtaining the approval of the Court.

"Fifth: Does the County Clerk have any authority to open mail addressed to the County Court or to individual members of the Court.

"Sixth: Is the County Clerk charged with any duty in regards to elections that requires him to visit the various election precincts either on election day or before, and if he so visits these precincts is there any provision for the Court paying him for expenses incurred.

"Seventh: Is not the County Clerk a clerk of the County Court and is without any responsibility or authority in the operation of the County government.

"Eighth: What recourse does the County Court have if the County Clerk refuses to comply with an order of the Court."

These questions will be taken up in numerical order.

1.

"Does the County Clerk have authority to insert into the County Court Record Book, opinions of his own and statements in regards to advice that he gives the court?"

Section 7, Article VI, Constitution of Missouri, 1945, provides:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

The county clerk has only such authority to insert into the County Court Record Book such entries as directed by law and ordered by the court, his duties and authority being purely statutory and none other.

A part of his duties is prescribed by Sections 1993, 1995, 2507, 13295, 13298 and 14566, R. S. Mo. 1939.

Section 13295, R. S. Mo. 1939, provides as follows:

"Every clerk shall record the judgments, rules, orders and other proceedings of the court, and make a complete alphabetical index thereto; issue and attest all process when required by law and affix the seal of his office thereto, or if none be provided, then his private seal; keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same: Provided, that where the clerk of the circuit court is a party, plaintiff or defendant (whether singly or jointly with others) to a suit or action, the writ of summons and all other process shall be issued by the clerk of the county court, the reason therefor being noted on said process, and said latter named clerk shall, on the trial of said cause, act as temporary clerk of the circuit court and otherwise perform in said cause all the duties of the circuit court clerk."

There are numerous other sections relating to the duties of the county clerk.

2.

"Does the County Court have authority to order the County Clerk to strike from the records entries made by the county clerk without order from the Court."

The county clerk is an officer of the county court. Although elected by the people, he is the clerk of said court and

his duties and limitations are prescribed by statute, and he cannot legally go beyond the statutes in his official capacity.

On this second point, the clerk is subordinate to the county court and the county court may order the clerk to strike from the records any entries made by him that were not authorized by the court or not legally required of the clerk to be entered. Such authority could be derived by the same rule as laid down in the case of Johnson v. Underwood, 22 S. W. (2d) 133, 324 Mo. 578, wherein it is said that, "County Court is 'court of record' within law authorizing courts of records to set aside orders showing irregularity."

3.

"Does the County Clerk have any authority to keep certain public records locked in private boxes where they cannot be procured for the Court when the Clerk is not present."

As pointed out above the statutes require the county clerk to file and keep certain records. Such records, therefore, are public records. In the case of State ex rel. v. Henderson, 169 S. W. (2d) 389, 392, 350 Mo. 968, the court said:

"In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it."

4.

"Does a County Clerk have any authority to issue beer or any other licenses without first obtaining the approval of the Court."

The matter of the issuance of licenses is regulated by various statutes. It is necessary to refer to them to determine whether the county clerk has any authority in connection with the issuance of such licenses.

Section 4904, R. S. Mo. 1939, which deals with intoxicating liquor licenses, provides that the holder of a liquor permit or license shall pay into the county treasury an amount to be determined by the county court. No authority is given the county clerk to determine the amounts to be paid or to issue any license.

Likewise, Section 8298, R. S. Mo. 1939, provides that,

"The clerk of the county court of such county shall issue as many blank licenses for money brokers or exchange dealers as the court may direct. * * *"

It will be seen by the foregoing statute that the county court directs the issuance of the licenses and that the duties of the clerk are ministerial.

Likewise, Section 15287, R. S. Mo. 1939, deals with the issuance of licenses to operate a ferry. Said section provides that the petition for such license shall be made to the county court and that if the court determines that the license should be granted, it should order the clerk to issue the license.

These, and similar statutes, all clearly show that the duties of the clerk with respect to issuing licenses are merely ministerial in carrying out the orders of the county court.

5.

"Does the County Clerk have any authority to open mail addressed to the County Court or to individual members of the Court."

It is criminal to open mail of others for the purpose of prying into its contents. Corpus Juris, Vol. 49, p. 1230, Sec. 285, says:

"By statute the taking of a letter or other mail matter before delivery to the

addressee with an intent to obstruct correspondence or pry into the secrets or business of another or the opening, secreting, embezzlement, or destruction of the same is made an offense. To constitute the offense, the taking must be wrongful or unlawful--with criminal intent--and this intent must exist at the time of the taking. It is not an element of the offense that at the time of the opening the letter was in the custody of any postmaster, carrier, or other person having charge of it. The offense intended to be defined, the other circumstances existing, is complete whether the letter contained anything of value, or not."

Section 4747, R. S. Mo. 1939, provides the following:

"If any person shall willfully open or read, or cause to be read, any sealed letter not addressed to himself, without authority to do so from the writer thereof, or from the person to whom it is addressed, he shall, on conviction, be adjudged guilty of a misdemeanor."

6.

"Is the County Clerk charged with any duty in regards to elections that requires him to visit the various election precincts either on election day or before, and if he so visits these precincts is there any provision for the Court paying him for expenses incurred."

Section 11596, R. S. Mo. 1939, provides that in cases where propositions are certified to him by the secretary of state to be voted upon, he "shall prepare and distribute ballots * *." We do not think this would mean that the county clerk is required personally to take the ballots and deliver them to each and every voting precinct, but means that he should prepare them and then distribute them in such a way that the voters will have them for use at the proper time and place, and such distribution could be

made in any manner which would accomplish that purpose. This section does not necessarily require the clerk to personally deliver them but to see that they are distributed, and does not make any provision for him to visit the various election precincts either on election day or before, nor for the payment of any expenses incurred by him personally. We do not find any other statutes which provide fees for his services in this connection.

Section 11598, R. S. Mo. 1939, provides the method of delivering of ballots to the judges of election for public officers. It provides that,

"* * * the clerk of the county court shall cause to be delivered to the judges of election of each election district which is within the county in which the election is to be held, the number of ballots printed for such district, said delivery to be made by the sheriff of the county, his deputy, or constable of the township, who shall be allowed a reasonable compensation for his services, to be provided for by the county court."

7.

"Is not the County Clerk a clerk of the County Court and is without any responsibility or authority in the operation of the County government."

The county clerk is the clerk of the county court. The duties, rights, powers and authority of the county clerk are prescribed by statute and he cannot go beyond the statutory law in the exercise of the same. The county clerk is not responsible for the operation of the county government nor does he have any authority in the same, except for such responsibilities and authority as is prescribed by statute.

8.

"What recourse does the County Court have if the County Clerk refuses to comply with an order of the Court."

As to the eighth question presented for our opinion, we think mandamus would be the proper action to be taken against a county clerk for refusing to comply with an order of the court. State ex rel. Gay v. Rayburn, 138 S. W. 79, 158 Mo. App. 172.

If the court can mandamus the clerk in their right to inspect the books, by the same rule they should have the same right to compel the clerk to comply with the orders of the court.

(This same rule should apply to the greater number of questions asked in the opinion relating to the powers of the court over the clerk, provided the court first makes the proper order to be complied with by the clerk.)

Conclusion

It is the opinion of this department that:

(1) the county clerk does not have the right to insert in the county record books opinions of his own and statements regarding advice he gives to the county court;

(2) the county court has authority to order the county clerk to strike from its records entries made by the county clerk without the order of the court;

(3) the county clerk does not have authority to keep public records locked in private boxes where they cannot be procured at all reasonable hours;

(4) the county clerk does not have authority to issue beer or other licenses except under order and approval of the court;

(5) the county clerk does not have authority to open mail of the county court or of individual members of the court,

April 13, 1945

unless so directed;

(6) the county clerk does not have any authority to visit election precincts either on or before election day and to charge for his expenses incurred in doing so;

(7) the county clerk is clerk of the county court elected by the people, and his responsibility and authority in the operation of the county government is limited to that prescribed by statute; and

(8) mandamus would be the procedure to compel the county clerk to comply with the order of the county court.

Respectfully submitted,

GORDON P. WEIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GPW:EG

PUBLIC RECORDS: When servicemen become entitled to certified copies of records free of charge. Discharges must be recorded free of charge. Recorders are not authorized by statute to charge for making ~~certified~~ copies of records.

June 11, 1945



Honorable Edwin Frieze
Prosecuting Attorney of
Dade County
Greenfield, Missouri

Dear Mr. Frieze:

Your letter of May 17, 1945, requesting an opinion on charges to be made by County Recorders for making certified copies of marriage licenses, and certified copies of discharges for servicemen, and the recording of discharges of members of the Armed Forces, has been received.

Your letter states:

"Will you kindly render me an opinion as to charges the Recorder of Deeds should make in connection with the following:

"1. Certified copies of Marriage License before one enters the service but obtained for the purpose of securing their allowance for wife and children should they be inducted.

"2. Recording the discharge of members of the armed forces.

"3. Certified copies of Discharges when they are obtained to be used for the purpose of securing employment, or as some case because the soldier wishes to have a copy to carry with him instead of the original.

"I understand that certified copies of discharges needed for making a claim on the government are to be furnished free of charge. Is

June 11, 1945

this correct?

"Kindly advise concerning the above, when to charge and what the customary charge is."

Section 3366, Article 2, Chapter 20, R. S. Mo. 1939, requiring marriage licenses to be recorded by the Recorders of Deeds of the several counties of the State, is as follows:

"The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return thereon, for which he shall receive a fee of one dollar, to be paid for by the person obtaining the same."

The Kansas City Court of Appeals in the case of State ex rel. Stephens vs. Moore, 96 Mo. App. Rep. 431, construed our marriage license statutes, and particularly the Section requiring the recording of such licenses. In holding that such records are public records, the Court, l.c. 435, said:

"The manifest purpose of the marriage-license statute was to make such licenses, returns thereto, and certificates of marriage, public records so as to give notice to all the world of the occurrence to which they severally relate. Their contents thereby become matters of public knowledge because the law requires them to be kept, authorized them to be used, and secures to all persons access to them, that knowledge of them may be public. * * *"

Section 15077, R.S. Mo. 1939, Article 7, Chapter 121, is as follows:

"Whenever a certified copy or copies of any public record in the state of Missouri are required to perfect the claim of any soldier, sailor or marine.

in service or honorably discharged, or any dependent of such soldier, sailor or marine, for a United States pension, or any other claim upon the government of the United States, they shall, upon request be furnished by the custodian of such records without any fee or compensation therefor."

Said Article 7, Chapter 121, was amended by the Laws of Missouri, 1943, page 643, by adding thereto Section 15077a, which is as follows:

"Any person who is the holder of a discharge from the Armed Forces of the United States may demand that said discharge be recorded by the recorder of deeds of any county in this State, including the recorder of deeds of the City of St. Louis, and it shall be the duty of said recorder of deeds to record said discharge without any fee or compensation therefor."

Section 15077, R.S. Mo. 1939, supra, answers the first one of your inquiries. This Section provides that whenever a certified copy of any public record is required by a serviceman, or by any dependent of such serviceman, for a pension or any other claim upon the Government of the United States, such copies shall be furnished free of charge. But we believe the applicant would, in order to come under the terms of said Section, have to be in the service of the United States, or he would have to have been in the service and be discharged therefrom. Becoming a serviceman would require the administering of the required oath after enlistment or induction, as we view it.

Section 15077a, Laws of Missouri, 1943, page 643, supra, answers the second inquiry in your letter. This Section is positive in its requirement that any serviceman who holds a discharge from the Armed Forces of the United States may have his discharge recorded by the Recorder of Deeds of any county in this State, free of charge.

A careful reading of our statutes does not disclose any statute requiring a Recorder of Deeds to furnish a certified copy of a discharge for a serviceman if the service-

June 11, 1945

man wishes to have the copy for the purpose only of securing employment or to carry with him instead of the original.

Reverting to Section 15077, R.S. Mo. 1939, we find that that Section designates the causes or purposes for which a serviceman may obtain a certified copy of any public record free of charge. These grounds are, to perfect the claim of any soldier, sailor or marine in service or honorably discharged, or of any dependent of any such soldier, sailor or marine, for a United States pension, or any other claim upon the Government of the United States.

Following the well-known rule of construction of statutes that where certain subjects and matters are especially mentioned by a statute, all other subjects are thereby excluded from the terms of the statute. This statute, by naming the purposes for which such certified copy of a record may be had free of charge, we think, excludes every other purpose for which such copies would be desired, and consequently, a charge could be made for such certified copies if desired only for the purpose of securing employment or to be carried about by the serviceman.

There is no such thing permitted by law as charging "customary" fees for services performed by public officers. Their services are held in law to be without compensation unless compensation is provided by statute. It was so held by our Supreme Court in the case of Nodaway County vs. Kidder, 129 S. W. (2d) 857, where the Court, l.c. 860, said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

Statutes respecting the charging of fees by public officers are strictly construed against the officers. It is so held in the case of Smith vs. Pettis County, 136 S.W. (2d) 282, 1.c. 285, where our Supreme Court, said:

"The rule is established that the right of a public official to compensation must be founded on a statute. It is equally established that such a statute is strictly construed against the officer. Nodaway County v. Kidder, Mo. Sup., 129 S. W. 2d 857; Ward v. Christian County, 341 Mo. 1115, 111 S. W. 2d 182. * * * *"

Section 13426, R.S. Mo. 1939, fixing the fees of Recorders, is as follows:

"Recorders shall be allowed fees for their services as follows:

"For recording every deed of instrument, for every hundred words.....\$0.10
In addition to the above fee for recording deeds, they shall be allowed for recording every such instrument relating to real estate, a fee of ten cents, as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate.
For every certificate and seal50
For recording a plat of survey, if not more than six courses..... .40
For every course above six of the same..... .02

June 11, 1945

"For copies of plats, if not
more than six courses40
For every course above six . .02"

Diligent and careful search has failed to discover any other or further statute of Missouri, authorizing Recorders to make any further charge for their services, and we find no statute whatever, permitting Recorders to make a charge for making copies of records of their offices, but they may charge \$0.50 for attaching certificate and seal to a copy of a record, except as is provided in said Section 15077, supra.

CONCLUSION.

It is, therefore, the opinion of this Department:

- 1) That before any person or his dependents under the terms of Section 15077, R.S. Mo. 1939, would be entitled to a certified copy of any public record, free of charge, such person would have to be actually sworn in in the service of the United States Armed Forces, or be discharged from service in such Forces.
- 2) That discharge papers of members of the Armed Forces of the United States must be recorded by Recorders of Deeds in the several counties in this State, free of charge.
- 3) That servicemen would not be entitled to certified copies of discharges free of charge to be used for the purpose of securing employment or merely to have such copies to carry about with them.
- 4) That no fee or charge may lawfully be made by Recorders of the counties of this State for making copies of records in their offices, but they may charge \$0.50 under the provisions of Section 13426, supra, for a certificate and seal attached to a copy of any record in such offices, except those exempted under Section 15077, supra.

Respectfully submitted,

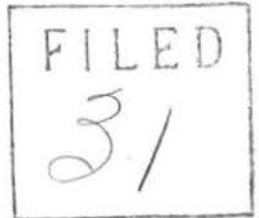
GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

Smith
TAXATION: Incorporated city within special road district under township organization not entitled to funds of the district.



November 2, 1945

Honorable Edwin Frieze
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

This office is in receipt of your request for an opinion under date of October 18, 1945, in which the following question is presented:

The City of Everton is an incorporated town and lies within the Everton Special Road District created in 1923. Until 1932 the Township Collector remitted to the City Treasurer of Everton a share of the road taxes collected. Since that time said road tax has been turned over to the Treasurer of the Everton Special Road District. Back taxes received are remitted to the City of Everton by the County Collector. Is the City of Everton entitled to its own road taxes from current collections? Township organization prevails in Dade County.

It is assumed that the Everton Special Road District was created under Article 16, Chapter 46, R. S. Mo. 1939, which applies in counties having township organization. Such road districts were authorized by Sections 22 and 23 of Article X of the Constitution of 1875, to levy additional taxes for road and bridge purposes. In pursuance to these provisions, the Legislature enacted Section 8841, R. S. Mo. 1939, which was amended in Laws of 1941, page 528. That section is, in part, as follows:

"The commissioners shall levy on the property taxable in every such incorporated district such taxes * * *, and such taxes when so collected shall be paid by the township collector to the treasurer of the special road district * * *. County courts shall cause to be set aside and placed to the credit of each road district so incorporated such portion of two-thirds of all revenue * * *. All revenue so set aside and placed to the credit of any such incorporated district shall be used by the commissioners thereof for constructing, repairing and maintaining bridges and culverts within the district, and working, repairing, maintaining and dragging public roads within the district, and paying legitimate administrative expenses * * *."

We are unable to find any statute in the laws applying to special road districts under township organization which authorize the transfer of any funds whatever to any incorporated city or town within such special road district. There is a provision which permits the expenditure of one-fourth of the revenue received by special road districts in counties not under township organization on the roads or streets within the corporate limits of any city within such special road district, and you refer to that section in your request. That statute is Section 8683, R.S. Mo. 1939, but by the provisions of Section 8673, R. S. Mo. 1939, it does not apply to Lade County or any other county having township organization.

We are unable to find a case involving an incorporated city and a special road district under township organization, but Lamar Township v. City of Lamar, 261 Mo. 171, was a case in which the township collector paid part of the road taxes collected in the City of Lamar, in Lamar Township, over to the treasurer of said city. In that case Lamar Township, in Barton County, sought to recover certain road and bridge funds levied and collected in Lamar Township for the years 1909, 1910 and 1911 and paid by the township collector to the City of Lamar. We find the following in the court's opinion, 1. c. 180:

"Do these taxes levied and collected by Lamar township, from the citizens living within the

corporate limits of the city, belong to the plaintiff township or defendant city? That it would seem fair for the city of Lamar to have them, all must admit. It is so recognized by our Legislature, as shown by their repeated efforts to pass and in passing such law. To whom public funds belong and the disposition that can lawfully be made of them, depends upon the law and not upon sentiment or anyone's idea of fairness. So it becomes the court's duty to be governed by the law and not by personal preference of the individual who discharges the judicial function.

"In the year 1908 the people adopted an amendment to the Constitution designated as section 22, article 10. * * * *

"It is clear under this section of the Constitution (Sec. 22) that of the road and bridge tax therein authorized to be levied and collected by Lamar township, no division could be made with the city of Lamar. It is required to be used for the roads and bridges within the township, and not upon the streets of the city. In the face of this constitutional prohibition no law could be passed by the Legislature taking away from the township one cent of the public funds authorized to be levied under it. * * * *

The court then proceeded to a discussion of Section 46 of Article IV of the Constitution of 1875, which is as follows:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

The court then concluded, l. c. 183:

" * * * Section 46 of the Constitution construed in the Kirkwood case, 142 Mo., supra, is reasonably clear and the construction placed upon section 46 in that case is logical and this court is of the opinion that the Legislature has no power to pass a statute authorizing the township to pay the part of the road taxes collected in the cities and towns into the treasury of such cities and towns. The court is satisfied, under the law, the road taxes collected by the township collector and paid into the city treasury belong to the township."

While the above case has not been reversed, it has been modified in State ex rel. Clay County v. Hackman, 270 Mo. 658, to permit the use of funds collected by a county on the streets and roads of municipal corporations when so expended by the county itself. The pertinent part of the latter decision is as follows, 1. c. 675:

"In so far, therefore, as the case of State ex rel. St. Louis County v. Gordon held that a county fund could not be granted to a municipality, we think the holding is correct; but in so far as it may be said to express the thought that a portion of the proceeds of bond issues as here involved cannot be used for improving portions of city streets which form connecting links in a county system of roads, we are of the opinion, for the reasons stated in paragraph II above, that such view is an erroneous one and should not be followed."

Under the authority of this case, a special road district under township organization, even in the absence of a permissive statute, might improve portions of city streets or roads which form an integral part of the special road district's system of roads and highways. Such use of funds would lie entirely within the discretion of the commissioners of the special road district and would be subject to the right of any incorporated city to control its own streets.

CONCLUSION

It is our conclusion that a special road district under township organization may not turn over any part of the funds allotted to it by other authority or collected by it to any municipal corporation within such district, but that such special road district may, in its discretion, maintain or improve streets within a city in the district which form an integral part of the roads and highways of the district, with the consent of the municipal corporation concerned.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

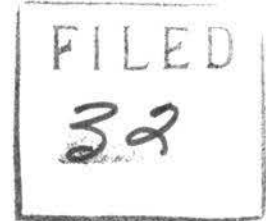
J. E. TAYLOR
Attorney General

RLH:HR

ROADS:
CRIMINAL LAW:
PUBLIC NUISANCE,

One who damages roads by turning water on it may be prosecuted and, in addition, act may be abated by Prosecuting Attorney as public nuisance.

February 24, 1945



Mr. J. B. Gallagher
Assistant Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

Recently you requested an opinion upon the following:

"The County Court of this county has a difficult problem. The farmers while improving their lands are doing considerable terracing and some are running the water into the road ditches, which has in some instances and may in others do considerable damage to the public road.

"Section 8581 R. S. 1939 apparently makes such conduct a criminal offense. I do not find any criminal cases in the reports making this specific conduct a criminal offense. There are many cases cited under this section for obstructing public roads by other means.

"However, in view of Section 645 R. S. 1939, the statutory law contained in Section 8581 controls, and I have so advised the county court. Am I right?"

Section 8581, R. S. Mo. 1939, denounces various acts and makes them separate misdemeanors, the separate acts being distinguished from each other by disjunctive "or." The following language of the section is pertinent here:

Mr. J. B. Gallagher

"* * * Any person or persons who shall willfully or knowingly * * damage any public road * * by turning water upon such road or right of way, * * * * * shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment. * * * * *"

In addition, to authorize criminal prosecution the section provides for the enforcement of a civil penalty upon failure to remove an obstruction pursuant to a notice. Thus, two different procedures are provided by the section.

This act has been passed upon and held valid upon several occasions by our courts of last resort. While no decision has been found containing the exact factual situation here presented, we conclude that any person who knowingly or intentionally damages a road by turning water upon it has violated its terms and is subject to prosecution. A charge in the language of the statute would be sufficient. State v. Burns, 172 S. W. (2d) 259, 351 Mo. 163.

The unlawful obstruction or damaging of a public road or highway constitutes a public nuisance. 29 C. J. Sec. 371, p. 616; 40 C. J. S. Sec. 217, p. 212. And, such nuisance may be abated by injunctive proceedings. The latter action may be brought by the prosecuting attorney and is cumulative. 29 C. J. 627; State ex rel. Rucker v. Feitz, 160 S. W. 585, 174 Mo. App. 456; State v. Franklin, 113 S. W. 652, 133 Mo. App. 486.

In the Feitz case, supra, and wherein the prosecuting attorney brought a mandatory injunction proceedings to bring about the removal of an obstruction in a public road, it was held (174 Mo. App. 1. c. 460, 461):

"These are well-recognized and frequently applied rules and it must be conceded that the statutes of this State cited by defendant provide means for the removal of obstructions in public highways and for the punishment of those who willfully or knowingly set up such obstructions. But the existence, of these remedies is not exclusive for the reason that they cannot

Mr. J. B. Gallagher

be held to be complete and adequate in all cases. The facts of the present case pointedly exemplify the inadequacy of the legal remedies. For a number of years the defendant has maintained a purpresture upon public rights and property in contempt and defiance of the law and the efforts of its officers to enforce it. A successful criminal prosecution has proved insufficient to overcome his determination and ability to persist in wrongdoing. The power and jurisdiction of a court of equity to give speedy and complete relief to the public in such case cannot be successfully questioned and has been expressly sanctioned in recent decisions of the Supreme Court and of this court. (State ex rel. v. Canty, 207 Mo. 439; State ex rel. v. Lamb, 237 Mo. 437; State v. Franklin, 133 Mo. App. 486; Heitz v. City of St. Louis, 110 Mo. l. c. 626.)"

CONCLUSION

It is, therefore, concluded that any person or persons who shall willfully or knowingly damage any public road by turning water upon it may be prosecuted under the provisions of Section 8581, R. S. Mo. 1939, and that, in addition to such prosecution, the Prosecuting Attorney may institute proceedings to abate such damage as a public nuisance, and that the criminal prosecution is not the exclusive remedy.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

VCT:CP

TAXATION: Real property acquired by municipality for use as airport is exempt from taxation.

March 8, 1945



3/8

Honorable Charles E. Ginn
Prosecuting Attorney
Mt. Vernon, Missouri

Dear Sir:

Reference is made to your letter under date of March 2, 1945, requesting an official opinion of this office, and reading as follows:

"Some four years ago, the City of Monett purchased a tract of land of 160 acres which lies in Lawrence County adjoining the city limits of the City of Monett. The land was bought and used for a municipal air port, and it is my understanding that it was leased to an operator for a certain compensation. Recently, the City of Monett has sold this tract of land, and although the land was assessed by the assessor of Lawrence County, Missouri, there has been no taxes paid on the property since its purchase by the City of Monett. The City of Monett has now asked the County Court of Lawrence County to abate the taxes assessed against this property, that is, the taxes assessed against the property while it was owned by the City. May I have your opinion as to whether or not these taxes should be abated?"

Upon the question of property such as you describe being exempt from taxation, an opinion was written by this office under date of June 13, 1944, directed to the Honorable

Honorable Charles E. Ginn

-2-

March 8, 1945

Curtis J. Quimby, Prosecuting Attorney, Cole County, Jefferson City, Missouri. For your information, a copy of such opinion is enclosed herewith.

In the light of the conclusion reached in that opinion that such municipally owned real property is exempted from taxation, it appears that no taxes such as are described in your inquiry could have been legally collected, based upon the ownership of the real property.

CONCLUSION

In the premises, it is our opinion that the real property described in your inquiry, which was owned by the City of Monett for the purpose of the operation of a municipal airport thereon, was at all times during the period of municipal ownership exempt from taxation; and that any taxes now appearing upon the tax books of Lawrence County which apparently constitute a lien upon such real property, and which were purportedly levied during the period of ownership by the City of Monett, should be abated.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

COUNTY COURTS: County court may reconsider set aside or modify its judgment at the same term of court in which the judgment reconsidered was made.

July 6, 1945

7/19

Mr. Charles E. Ginn
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri



Dear Mr. Ginn:

In a letter dated June 20, 1945, you wrote this office for an official opinion, as follows:

"Our county court recently made an order vacating a part of a street as provided in Section 7320, Revised Statutes of Missouri, 1939, and it is conceded that all of such proceedings were proper. They are now confronted with a petition to set aside their former judgment vacating a part of such street. The question which I am unable to determine for them is whether or not they have jurisdiction and authority to reopen this matter, since the time for appeal is already past.

"It is conceded that the Circuit Court, due to their equity jurisdiction, have control over their judgments at any time during the term rendered, but I am unable to determine if the county court has the same authority. Will you please give me your opinion on this question at your earliest convenience, so that if the county court has such authority, they may reopen the matter during the present term of their court."

By various statutes of the state of Missouri now in force the county courts are authorized and empowered to perform func-

tions of a judicial nature. These statutes, even if inconsistent with the provisions of the Constitution of 1945, will remain in force until July 1, 1946. It is apparent, therefore, that the county courts must of necessity retain their judicial powers until July 1, 1946, or until the Legislature repeals these statutes.

County courts were declared to be courts of record by the old Constitution and also by Section 1990, R. S. Mo., 1939. Section 1990 will be in force until repealed or until July 1, 1946. The courts of Missouri hold that all courts of record have the power to modify or set aside their judgments during the term.

In re Application of Henry County Mut.
Burial Ass'n., (1934 Mo.) 77 S. W. (2d)
124, 229 Mo. App. 300;
Boegman v. Brace, (1926 Mo.) 285 S. W. 992;
Bartling v. Jameson, (1869 Mo.) 44 Mo. 141.

The general principle that all courts possessed with judicial power can modify, set aside or reverse their judgments, if such action is taken during the same term of court, is enunciated in many cases in Missouri. This proposition is usually stated by saying that the judgment is within the breast of the court during the term in which the judgment was rendered.

McCormick v. St. John & Brown, (1941 Mo.)
236 Mo. App. 72;
In re Savings Trust Co. v. Skain, (1939 Mo.)
345 Mo. 59;
Rottman v. Schumucker, (1887 Mo.) 94 Mo. 139.

In H. H. Johnson v. J. Underwood, (1930 Mo.) 24 S. W. (2d) 133, 324 Mo. 578, the owners of land within a special road district brought suit against the county to compel the county court to set aside and cancel certain tax bills upon the security of which bonds were issued and sold by the road district. The county court several times modified and changed its order and judgment regarding the amount of the cost of improving the roads. Some of these changes were made regarding judgments made during a prior term and others regarding judgments made during the same term. A new estimate of costs was made by the county court on December 3, 1923. There were errors in the calculations of the extra expenses and the court on January 16, 1924, at the same

term, set aside the prior order of December 3, 1923, and entered a corrected order. The court, in discussing this last and final order of January 16, 1924, said:

" * * * The order of January 16, 1924, likewise shows that it was made at the same term and was, therefore, within time to correct prior erroneous orders made at the same term.
* * * "

Throughout this case the court considered the action of the county court regarding the issuance of bonds, the estimates of cost, and the levying of assessments as a judicial proceeding. The early orders of the county court were taken, on certiorari, to the circuit court, and the Missouri Supreme Court, in the case cited, impliedly indicated that this was proper. If certiorari was allowed in the proceedings, they must have been, of necessity, judicial proceedings. Also, throughout the case, the court used the words "order" and "judgment" interchangeably. We think, from the context of the case, that the court considered the judicial function performed by the county court as an "order" of the county court. This is illustrated by the following quotation from the case which has to do with the orders of the court in the proceedings there dealt with (24 S. W. (2d) 1. c. 140):

" * * * This judgment continued the cause to May 2, 1922, upon which date the court rendered a correct judgment separating the two projects. On June 6, 1922, and at the same term, the court of its own motion corrected this order. The order and decree of December 8, 1923, based upon a reduced cost estimate, was expressly authorized as a new order by the terms of section 10845a, Laws 1923, p. 348. The validity of this order has already been discussed and sustained in this opinion. * * * "

It is, therefore, our opinion that the county court may reconsider its orders or judgments which are of a judicial nature at any time during the term at which the order reconsidered was made.

The question then arises as to whether the court was exercising a judicial function when it vacated a part of the street

July 6, 1945

which you refer to in your letter, under Section 7320, R. S. Mo., 1939.

This section reads as follows:

"Whenever a tract or parcel of land, being outside the limits of any town or city, shall have been subdivided, and streets, avenues or roads marked on the recorded plat of the subdivision, it may be lawful for the county court of the county in which the subdivision has been made to vacate the streets, avenues or roads, or a part of either, upon petition of the owner or owners of the ground lying on both sides of or fronting on the street, avenue or road or part thereof proposed to be vacated. But no such vacation shall be ordered until proof shall be made to the court of the publication in a newspaper published in the county, or of written or printed notices posted in five public places in the county, at least fifteen days prior to the term of the court at which such petition shall be presented, that application would be made at that term of the court for the vacation of the street, avenue or road or part thereof, as described in the petition. Such notice shall state distinctly the nature of the application, when it is to be made, and what street, avenue or road, or part thereof, is proposed to be vacated; and if no person interested in such subdivision shall appear and show cause to the court why the vacation should not be made, the court may make the order for the vacation as requested in the petition."

We think the court's action, under this section, was a judicial proceeding.

Section 88 of 39 C. J. S., page 1020, reads as follows:

"Judicial and discretionary acts. Within the rule that certiorari lies only to review

judicial acts, the proceedings of highway officers in opening or vacating public roads, under statute authority, are judicial proceedings. * * * "

In *Barnett v. County Court*, (1905) 111 Mo. App. 699, the court had before it the question of appeal from the decision of a county court. The case turned upon the question of whether the county court was acting in a judicial function. The court held that it was acting in such manner where the order or judgment involved the life, liberty, or property rights of an individual.

In *City of Berkeley v. Petitioners for Disincorporation*, (1941 Mo.) 155 S. W. (2d) 138, the court was concerned with the right of appeal from a judgment of the county court disincorporating the city. Here, again, the question was whether the action was judicial in nature. A newspaper notice of the petition to disincorporate was required to be given by the statute governing such actions by the county court. The court held the county was acting judicially. In deciding the case, the court said, l. c. 140:

" * * * If in acting on the application the county court is to merely perform an administrative function, as petitioners contend, there would be no purpose of a notice being given. * * * "

In Section 7320, *supra*, the statute also requires a notice to be given before action by the county court.

In *State v. Cracraft*, (1943 Mo. App.) 168 S. W. (2d) 953, which was an action in prohibition to restrain the judges of the county court from taking further action in a proceeding for vacation of a public road, the county court, on February 10, 1941, entered an order vacating a road. The circuit court, on appeal, set aside the judgment of the county court. Afterwards, in September, 1941, another proceeding by the same parties and twenty-six others was instituted in the same county court to vacate the same road. The present action was to restrain the county court from acting on the second petition. The relator contended the second county court proceeding was barred under the doctrine of *res adjudicata* by the judgment of the circuit court in the first proceeding barring vacation of the road.

The circuit court entered a final order in the prohibition action and the defendant appealed.

The St. Louis Court of Appeals reversed the circuit court's final order of prohibition. They held the question of whether the decision of the circuit court was res adjudicata in the first proceeding for vacation was for the county court to determine. The court said, l. c. 955:

"Res adjudicata is an affirmative defense. It goes to the merits, not to the jurisdiction. It raises issues of fact and maybe issues of law as well. The decision of issues arising on the merits is peculiarly within the jurisdiction and power of the inferior court. * * * "

The court further indicated the judicial nature of the proceeding in the county court by the following:

" * * * If there was a substantial compliance with these provisions in the first proceeding for the vacation of the public road in question here, and there was no subsequent change in the conditions, we think the judgment in the first proceeding becomes res adjudicata as to the second proceeding, notwithstanding the petition in the second proceeding may be signed by twelve or more freeholders who were not parties to the petition filed in the first proceeding. But the issues thus raised are clearly for the decision of the county court. It has full jurisdiction and power to decide the same. If its decision is wrong, it is a matter of error and not of jurisdiction, and the relators have their remedy by appeal."

From the above, we are of the opinion that an order of the county court vacating a public road, or a part thereof, is in the performance of the judicial function of the county court.

July 6, 1945

However, we think the result in the matter of whether the county court can reconsider its decision at the same term would not be changed if the court was acting in an administrative capacity. In *State v. Cooper County Court*, (1853) 17 Mo. 507, the Supreme Court held:

" * * * But if the county court, in its administrative capacity, does an act which should afterwards be deemed unwise, inexpedient or exceeding its authority, it may at any time correct its course. * * * "

So far as we have been able to determine, this case has never been overruled or modified.

We are, therefore, of the opinion that the county court may reconsider an order rendered in the exercise of either its administrative or judicial functions at any time during the same term of that court.

The provisions of the new Constitution might so change the county court's organization that the old law, as set out above in this opinion, would not apply after July 1, 1946. However, since your question does not raise this issue, we have not considered that point in this opinion.

CONCLUSION

It is, therefore, the opinion of this department that the order of the County Court of Lawrence County rendered at the present term, which you refer to in your letter, may be reconsidered, modified and set aside by the county court at any time during the present term.

Respectfully submitted,

Smith N. Crowe

SMITH N. CROWE

Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:HR

- ESTATE TAX: (1) Applicability of Federal estate tax statutes in determining Missouri estate tax.
(2) Applicability of Federal estate tax on property exempt from Missouri inheritance tax in determining Missouri estate tax.

March 2, 1945



Honorable Charles S. Greenwood
Prosecuting Attorney
Chillicothe, Missouri

Dear Sir:

Reference is made to your letter under date of February 24, 1945, requesting an official opinion of this office, and reading as follows:

"I am writing relative to Section 574, Revised Statutes, 1939. This has to do with the tax imposed upon the net estate of the decedent after the Federal Estate Tax has been determined.

"The question is: Which of the Federal Estate taxes is taken into consideration; that is, is the basic tax (Federal) the only one considered in determining the 80% mentioned in it; or do you take into consideration the additional estate tax (Federal) also? In other words, in determining the tax due under this section, is the basic Federal Estate Tax and the additional estate tax considered; or is it the basic tax alone?

"Another question: In determining the amount of the tax under the Federal Estate Tax law property held in joint tenancies by the entirety is considered a part of the decedent's estate. Under the Missouri inheritance tax law, joint tenancies and tenancies by the entirety are

not considered a part of the estate.
Are they considered a part of the estate in determining the amount due under this section 574?"

For convenience in writing the opinion, we have divided your request into its two elements.

I.

The Missouri estate tax is imposed by Section 574, R. S. Mo. 1939, which reads as follows:

"In the event that the total of the inheritance taxes imposed upon the several interests and property comprising the estate of the deceased, by law, less exemptions allowed by law, and all other state inheritance taxes, shall not equal eighty per centum of the amount of the tax imposed upon the value of the net estate of said decedent, under the federal estate tax law, whenever the federal estate tax is determined an additional tax shall then be imposed upon the value of the net estate of said decedent as of the date of such determination equal to the difference between the total of the tax imposed under said section 573 as amended and eighty per centum of the tax imposed by said act of congress."

This section is a reenactment of Section 573, R. S. Mo. 1929, which section first appeared in Laws 1929, at page 103. The last mentioned act repealed the original Missouri estate tax law, found in Laws 1927, at page 100.

No cases appear in the reports of the Missouri appellate courts construing this section in regard to the matters about which you inquire. It, therefore, becomes necessary to determine by the rules applicable to the construction of

statutes whether or not the additional Federal estate tax, together with the basic Federal estate tax, is to be used in determining the total Missouri estate tax. The primary rule is stated thusly:

"The fundamental rule in the construction of statutes is to ascertain and give effect to the purpose of the Legislature." (State ex rel. v. Hackmann, 258 S. W. 1011.)

The purpose of the Legislature in enacting the original Missouri estate tax law has been declared by the Supreme Court in the case of Brown v. State, 19 S. W. (2d) 12, from which we quote, l. c. 15:

"The apparent purpose is to amend the then existing article entitled 'Inheritance Tax' by providing in two new sections for a minimum tax on the estate of decedents of 80 per cent. of the amount of tax imposed under a designated act of Congress, and it is clearly expressed in the above title."

Inspection of the original Missouri estate tax act, found in Laws 1927, at page 100, discloses that the act by its terms designated Title III of the Revenue Act of 1926 as the basis to be used in computing the Missouri estate tax. Examination of the Federal law referred to is explanatory of why this was done. The Federal act provided that an estate should be allowed as a credit against the tax imposed thereunder all state inheritance and estate taxes paid to an amount not in excess of eighty per centum of the federal tax computed thereunder. The effect of the Missouri estate tax law was to secure for the State of Missouri considerable revenue, without adding to the total tax to be paid by the estate, which would have otherwise been payable to the Federal Government.

The basic Federal estate tax has remained unchanged with respect to the credit allowance mentioned, although

amended in other matters. In addition, by Act of June 6, 1932, and amendments thereto, an additional Federal estate tax has been imposed upon the estates of decedents. However, in neither such act, nor the amendments thereto, has the eighty per centum credit provision been incorporated.

Another rule for the construction of statutes is this:

"Long-continued interpretation of statute by public officers charged with its execution should be considered in construing statute." (State ex rel. v. Bank, 249 S. W. 619.)

The collection of the Missouri estate tax is imposed upon the State Treasurer, whose uniform practice since the enactment of the additional Federal estate tax law has been to disregard such law in computing the Missouri estate tax. We think this action on the part of the State Treasurer persuasive in construing this statute.

A third rule of construction of statutes is said to be:

"A statute limiting thing to be done in particular manner includes in itself a negative, namely, that such thing shall not be done otherwise." (State ex rel. v. Holtcamp, 14 S. W. (2d) 646.)

In this regard, your attention is directed to the following portion of Section 574, R. S. Mo. 1939:

" * * * shall not equal eighty per centum of the amount of the tax imposed * * * under the federal estate tax law * * * and eighty per centum of the tax imposed by said act of congress."

March 2, 1945

It is apparent that such phrases so incorporated in the act indicate an intention on the part of the Legislature to retain the basic Federal estate tax law as a means of determining the Missouri estate tax, particularly in the light of the use of the eighty per centum clause, which credit is not allowed under the additional Federal estate tax law.

We, therefore, conclude that in view of the declared purpose of the Legislature in enacting the original Missouri estate tax law, the retention in the revision of the original law of specific reference to a Federal estate tax law coupled with words fixing the Missouri estate tax at eighty per centum of the estate tax computed under such Federal estate law, and the failure of the Federal Government to allow any credit for state inheritance or estate taxes against the additional Federal estate tax, that the Legislature did not intend to impose a Missouri estate tax equal to eighty per centum of the Federal estate tax computed under the provisions of the additional Federal estate tax law. To give such effect to the law would require the estates of Missouri decedents to pay dual Federal and Missouri estate taxes upon a portion of the assets of such estates, which result was specifically avoided in the original Missouri estate tax law by limiting the liability for Missouri estate tax thereunder to an amount for which full credit could be obtained against the Federal estate tax due on the same estate.

II.

With respect to the inquiry contained in the last paragraph of your letter, we think the following pertinent.

In the case of *Brown v. State*, 19 S. W. (2d) 12, the original Missouri estate tax law was attacked upon a number of grounds. In ruling two of the objections, the Supreme Court said:

"Six: Said statute attempts to levy a tax on the interests of a widow allowed by law in the estate of her deceased husband."

"We do not think so. The amending act and the law it amends must be read together. From such a reading it appears that the imposition of a tax under the original act should precede the imposition of the 'additional tax'; that the total amount of this tax should be applied as a credit upon the amount represented by 80 per cent. of the federal estate tax; and that the remainder would be the total amount of the 'additional tax' to be imposed. In computing the first tax the widow is allowed her exemptions under the state law. If the 'additional tax' be regarded as of the same kind and character, it seems obvious that the widow should not be allowed exemptions again. If, on the other hand, it be regarded as an estate tax, and we think it must be, it comes out of the estate, is not deducted from the widow's share, and, hence, is not levied upon her interest or right to receive. In either event the amendment is not open to the objection raised.

"Seven: The effect of said act is to tax insurance, in violation of the law of Missouri, in that it seeks to adopt portions of the Federal Statute under which insurance over a certain amount is taxed."

"What we have said in answer to objection No. 6 applies in principle to this objection, and it is overruled."

By analogy, we think the same reasoning would further apply to property held in joint tenancy. We believe that it is only the amount of the Federal estate tax that is material to the determination of the Missouri estate tax, without regard to the kind or nature of the property included in computing such amount.

Hon. Charles S. Greenwood

-7-

March 2, 1945

CONCLUSION

In the premises, we are of the opinion that only the Federal estate tax computed under the basic Federal estate tax law is to be used in determining the amount of the Missouri estate tax.

We are further of the opinion that the Missouri estate tax is to be fixed at the difference between the total of Missouri inheritance taxes and eighty per centum of the basic Federal estate tax, without regard to the kind or nature of the assets of the estate used in computing such basic Federal estate tax.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

DEPARTMENT OF FINANCE:

Construing a sales contract as not
infringing upon banking business.

February 27, 1945

FILED

37

31
Honorable D. R. Harrison
Commissioner of Finance of Missouri
Jefferson City, Missouri

Dear Commissioner Harrison:

Your letter of recent date to General Taylor, with which you enclosed copy of letter from your office to Mr. W. C. Rosenbaum, Manager, Investors Division, Better Business Bureau of St. Louis, under date of February 14, 1945, Mr. Rosenbaum's letter to you of date February 3, 1945, copy of letter of Mr. Mart Manley for the Electrolux Corporation to Mr. Lehman C. DeMoss, 3527 Fair St., St. Louis (15), Missouri, of date November 9, 1944, and photostat contract between the said Corporation and the said DeMoss, has been received and assigned to the writer for the opinion requested in your letter.

Without referring to the other documents enclosed with your letter, it is believed that reciting the body of the contract will clarify the situation to identify the subject matter upon which you desire an opinion. Omitting the signature, the contract referred to and exhibited in the photostat is as follows:

"Electrolux Preferential Post-War Cleaner
Contract

Print Date clearly as this Date will
be used for Preferential Delivery.

Dated: 8/18/44

Electrolux Corporation agrees that promptly after Governmental restrictions are removed and it is permitted to resume manufacture for civilian consumption, it will reserve and deliver to customer, and customer agrees to purchase, a Model XXX Electrolux Cleaner and Air Purifier at the standard purchase price at time of delivery and Customer has made an advance of \$25 against such price.

" At the time of delivery of the cleaner, customer may elect to pay the purchase price

in installments. In such event customer shall sign the standard form of Electrolux installment contract. Any balance of the down payment shall be paid at that time and installment payments shall mature in equal monthly amounts, all in accordance with applicable laws and regulations.

"Customer may cancel this contract only if (1) upon resumption of manufacturing for civilian purposes, the standard Electrolux price, exclusive of taxes, exceeds \$91, or (2) delivery is not made within six months after such manufacturing is commenced, in either of which events customer's sole remedy shall be the return, upon demand, of the \$25 advance.

"Present and future governmental laws and regulations, when applicable, shall be deemed to modify and form a part of this contract.

"This contract may be assigned."

The matter then resolves itself into the question whether the entering into the contract shown in the photostat and the doing of the acts therein contained, or therein promised to be performed later, shall be construed as doing a banking business.

Section 7998, Article 2, Chapter 39, R.S. Mo. 1939, under the general title of State Department of Finance, and under the particular title of Banks, is as follows:

"The term 'bank' shall include any person, firm, association or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check, or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing."

One of the standard law text works on banks and banking and perhaps the text authority most generally used by the bench and bar is Corpus Juris. In 7 C. J., page 473, a "bank" is defined generally as follows:

"While the term 'bank' has received a number of definitions differing considerably in language, but all

expressing of course the same fundamental ideas, and the sense in which it is intended to be used is largely determined by its connection with other language, perhaps the most concise and at the same time complete definition to be found in the books is that a bank is 'an association or corporation, whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, and issue promissory notes payable to bearer, called "bank-notes" ! * * *"

The same volume of the same work at page 477, defines "banking" as follows:

"Banking is the business or employment of a bank or banker; and as defined by law and custom consists of receiving deposits payable on demand, discounting commercial paper, making loans of money on collateral security, issuing notes payable on demand and intended to circulate as money, collecting notes or drafts deposited, buying and selling bills of exchange, negotiating loans, and dealing in negotiable securities issued by the national or state government, or by municipal or other corporations. * * *"

Further treating the subject of banks and banking, 7 C.J., page 641, in defining the relationship created between a bank and a depositor in the bank, states the rule as follows:

"H. Relationship between Bank and Depositor. The contract between a bank and a depositor is not materially different from any other contract by which one person becomes bound to take charge of and repay another's funds, and there is no trust relation between a bank and a general depositor. The relations between a bank and a depositor may be dual in character, the bank being the depositor's debtor with respect to one thing and his agent with respect to another, or his debtor at one

time and his agent at another; and while the relation between the bank and a depositor in respect to a general deposit is generally regarded as that of debtor and creditor, yet in another sense the depositor is the owner of the deposit, in that he can demand repayment at any time. * * *

These rules of law under the facts disclosed by reading the body of the contract in question would seem to be conclusive that there is no act, nor is there any element of any act, recited therein as having been performed, or promised therein to be performed, which would in any degree partake of the acts necessary to constitute and be construed as doing a banking business.

The contract in question appears to be a conditional or executory sales contract of personal property.

This contract states that after government restrictions are removed and the Corporation is permitted to again resume civilian manufacture of its products, it will reserve and deliver to the customer one of its machines, and the customer agrees to purchase such machine at the standard purchase price at the time of delivery, and that the customer made an advance payment of \$25.00 on the purchase price. Then follow provisions respecting a deferred payment plan to be adopted at the time of the delivery of the machine, if the customer shall so elect.

It then provides that the customer may cancel this contract only if:

"(1) upon resumption of manufacturing for civilian purposes, the standard Electrolux price, exclusive of taxes, exceeds \$91, or (2) delivery is not made within six months after such manufacturing is commenced, in either of which events customer's sole remedy shall be the return, upon demand, of the \$25 advance."

It will be observed in reading the contract that this is in effect a conditional or executory contract where the seller does not part with the title to the machine mentioned nor with the possession thereof since the same is to be conditionally delivered at a future date.

Referring again to Corpus Juris, that work in volume 55 at page 1194 states as follows:

February 27, 1945

"As already indicated, it is an indispensable element of a conditional sale and the distinguishing feature thereof that the title to the goods remain in the seller until payment of the price. * * * A conditional sale contemplates the relation of seller and buyer, and does not create the relation of debtor and creditor. * * *"

It will thus be observed, under the last authority quoted, 55 C.J. 1194, that in a sales contract the relation of seller and buyer is created by a contract such as the one in question, and that under the rule stated in 7 C.J., 641, the relation created between a bank and a depositor is that of debtor and creditor.

It is the acts which are performed in the one case or the other from which must be determined the effect of those acts in creating the status of whether such acts amount to banking on the one hand, or merely a case of barter and sale on the other hand. The buyer here makes a down payment on the purchase price of the article conditionally sold to him, but this is not a "deposit" such as is termed a "deposit" in banking business.

7 C.J., page 628 defines bank deposit as follows:

"A general deposit which is the ordinary form is the payment of money into the bank to be repaid on demand, in whole or in part, as called for in any current money. * * *"

The sum advanced by the buyer, according to the terms of the contract under consideration, is a part of his obligation as a party to a sales contract as distinguished from a "deposit" as an incident to banking business. Volume 48, C.J., page 585, under the subject of "Payment", defines "payment" as follows:

"The term 'payment', in its more restricted legal sense, may be defined as the discharge in money of a sum due, or the performance of a pecuniary obligation. In its more general acceptation, however, the term may mean the fulfillment of a promise, the performance of an agreement, the satisfaction

February 27, 1945

of a claim, the discharge of a liability, or the accomplishment of an obligation, whether by giving or by doing. * * *

Under the terms of this contract the sum paid by the buyer is not to be repaid on demand as would be the case if it were a deposit in banking business, but it is only to be repaid if certain conditions therein named are not complied with later, and then only to be returned as an "advance" payment, and it is so named therein as the expression of the mutual intention of the parties at the time, and it cannot now be converted into an act resembling a bank deposit.

The definition of payment given by the St. Louis Court of Appeals in the case of Clay vs. Lakenan, 101 Mo. App. 563, l.c. 568, very well expresses the law on this transaction as showing a barter and sale business between these parties instead of banking business. That decision at the local citation given, states:

"*V* * The term or expression, 'payment,' is now applied in a dual sense: in the restricted or common use, it signifies a discharge in money of a sum due, and in such sense would not embrace a satisfaction of an indebtedness otherwise than by the transfer of money from the payor to the payee. But in a broader and more general sense, it is defined to be the performance of an agreement, or the fulfillment of a promise or obligation, whether it consists in giving or doing, and in the latter application would include the discharge of a contract or obligation in money or its equivalent by the assent of the parties. * * *

From the terms of this contract it is apparent that both parties intended the transaction to be one of purchase and sale, with no intention of doing a banking business. The intention of the parties to a contract is the basic rule upon which contracts are construed. Volume 13, C.J., page 521, 523, says on this subject:

"The primary rule in the construction of contracts is that the court must, if possible, ascertain and give effect to the mutual intention of the parties, so far as that may

February 27, 1945

be done without contravention of legal principles. Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. No matter how broad or how general the terms of the contract may be it will extend only to those matters with reference to which the parties intended to contract.
* * *

Here it would seem that there is no difficulty, when this contract is carefully read, in arriving at the conclusion that neither the making of the contract nor the performance of its conditions are acts of banking, but on the contrary, it is an executory, conditional sales contract. This contract does not provide for the performance of any act nor the promise to perform any act which would make them acts of banking as defined by Section 7998, R. S. Mo. 1939, nor as coming under the definitions of banking in the text authority herein cited and quoted.

CONCLUSION.

It is, therefore, the opinion of this department, considering the agreements and conditions set out in the photostat of this contract, and under the rules of law above cited as applicable thereto, that transactions of this sort cannot be construed as doing a banking business.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

GWC:lr

BANKS:

Who may rent safe deposit boxes.

March 9, 1945

3-13



Honorable D. R. Harrison
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Harrison:

Your letter of recent date to General Taylor requesting an opinion respecting who may engage in the business of renting safety deposit boxes, has been referred to the writer for reply and for the opinion requested.

Your letter states:

"I shall appreciate an opinion as to whether any person, firm or company other than a bank or trust company can engage in the business of renting safety deposit boxes and if so the requirements with which they must comply."

Under the common law, any person could or may carry on any business that is lawful and innocent, subject only to such regulation as statutes, under the exercise of the police power of a State for the general welfare, may impose. On this rule of law, 12 C.J. page 921, has this to say:

"The right to labor and the right to enjoy the rewards thereof are natural rights which may not be unreasonably interfered with by legislation. It is therefore beyond the police power to prohibit persons from engaging in the common business occupations or employments that are innocent and lawful in themselves, and that do not require the exercise of any special skill; and as to such occupations, the scope of

March 9, 1945

the police power is confined to the enactment of regulations to promote the public health, safety, and welfare. * * *

54 C.J., page 1116, defines a "safe deposit company" as follows:

"A company which maintains vaults for the deposit and safekeeping of valuables in which compartments or boxes are rented to customers who have exclusive access thereto, subject to the oversight and under the rules and regulations of the company; one whose purposes are to keep and maintain safe deposit vaults and safes and strong boxes for the safe-keeping of valuable articles and property of all kinds."

Article 5, Chapter 39, R.S. Mo. 1939, deals with the subject of "Savings Banks and Safe Deposit Institutions". The article in its various sections treats in detail of the organization and operation of corporations for financial profit by receiving and using and lending deposits of money, selling securities, bonds, stocks, and other personal property which is especially mentioned in Section 8102, but we believe none of its provisions apply to the simple business of renting a safe deposit box by a bank or any other person for the mere purpose of furnishing a safe place for keeping such property. However, these provisions of Article 5, supra, have never been passed upon nor construed by the Courts of Missouri respecting safe deposit business.

Section 7997, R.S. Mo. 1939, does provide that banks doing a safe deposit business may be entitled to special remedies in enforcing payment from renters or lessees of such boxes. These provisions may be observed by reading said section, which is quite too long for copying or quotation here, but it will be seen in the last part of sub-section 1 of said Section 7997, that it is stated that banking corporations shall have a lien on such deposits to the same extent and enforcing the same method for payment of the rent for boxes as is now provided by law with reference to "warehousemen".

Section 8071, R.S. Mo. 1939, gives the same special remedies to trust companies doing a safe deposit business to enforce liability against renters or lessees of boxes.

The last part of sub-section 1 of Section 8071 also ties the methods of such enforcement in with "warehousemen"

March 9, 1945

for trust companies as does Section 7997, respecting banks. It will, therefore, it is believed, be a reasonable conclusion at which to arrive therefrom, that the Legislature did not intend to give, and did not give, banks or trust companies any special or exclusive right as a part of banking business to conduct a safe deposit business. Indeed, it may well be said that they did not undertake to give such institutions any right at all with respect thereto, because they possess that right under the common law, and the Legislature only provided, in cases where the right should be exercised, that they shall have the same rights and methods given to warehousemen to collect for their rentals.

We find nothing in our statutes prohibiting any person or corporation from conducting a safe deposit business in this State, nor is there any statute in this State regulating such business, except under the warehousemen's Act, Sections 15476, etc. The State of New Jersey in 1890 passed an Act very similar to our Article 5, Chapter 39, relating to Savings Banks and Safe Deposit Institutions, supra.

That Act was construed by the Court of New Jersey in the case of State vs. Kelsey, 53 N.J.L. 590. That case was a mandamus proceeding to compel the Secretary of State of the State of New Jersey to file a certificate of incorporation of a corporation organized under the Act of 1890 of that State, which, as we view it, from the statement made in the syllabus and in the text of the decision, is very similar to our savings banks and safe deposit institutions Act, for the sole purpose of renting safe deposit boxes and vaults. The Secretary of State of New Jersey refused to file the certificate of incorporation as requested on the ground that the company came under the terms of the Act of 1890, and that it had not provided the one hundred thousand dollars capital, nor had they procured the approval of the State Board of Bank Commissioners, both of which were required by the Act of 1890.

The case of State vs. Kelsey, 53 N.J.L. 590, held that the Act of 1890 of the State of New Jersey, did not apply to corporations organized solely for the purpose of renting safety deposit boxes but that it did apply to financial institutions such as banking companies, savings institutions and others designed to derive profit from the loan or use of money or securities. In the course of the opinion, the Court, l.c. 591, 592, said:

"The question to be determined is whether, by reason of the name so adopted by the

corporation certificate, and because of the objects and purposes which it aims to work out in its future, or either of these, bring it within the spirit and meaning of the enactment in question. If it be embraced within the restrictive law of 1890, the relators must fail in their suit, for they have not in their organization the required capital; nor has the incorporation received the approval of the board of bank commissioners. But if, on the other hand, this company is not, in the legislative intent, included within its provisions, then, as the act of the secretary of state becomes, in receiving the certificate, purely a ministerial one, mandamus should issue as the appropriate and only legal remedy of relators."

"* * * It intended to treat exclusively of financial corporations and associations, such as banking companies, savings institutions and others designed to derive profit from the loan or use of money or securities. Such clearly appears to be its general purpose, and each of its details plainly aims at the regulation of such institutions for the public protection; and not one of them is appropriate to corporations like that formed by the relators, or possessed of any meaning when applied to such."

The Court directed the Secretary of State by mandamus to file a certificate of incorporation as requested.

Both the New Jersey Act and our savings banks and safe deposit institutions Act are directed at financial corporations and such banks and institutions as accept and use by lending, selling, and re-investing, for profit, money and securities and other property and do not include persons, associations or corporations who may desire to keep and maintain and rent safe deposit vaults or boxes for the safekeeping of valuable personal property. The New Jersey case cited is, we think, sound authority for the opinion that the proposed renting of a vault and safety

March 9, 1945

deposit box by the individual does not come under our savings banks and safe deposit institutions chapter, supra. Neither is such an undertaking prohibited or regulated in any particular by any of our banking statutes but is only amenable to the warehousemen's Act and a license to do such business would only be required in cities of over 25,000 inhabitants, as is provided in Section 15479, R.S. Mo. 1939.

CONCLUSION.

It is, therefore, the opinion of this department that "any person, firm or company other than a bank or trust company can engage in the business of renting safety deposit boxes" and that there are no requirements of law with which they must comply, except those contained in the warehousemen's Act of Missouri, in cities of over 25,000 inhabitants.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

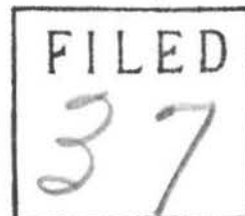
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LIQUIDATION

A LOAN & INVESTMENT CO.:

Department of Finance may
hold funds remaining on
liquidation of company.

April 13, 1945



Honorable D. R. Harrison
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Harrison:

Your letter of March 16, 1945, accompanied by a statement of facts and memorandum brief, has been received and assigned to the writer to prepare the opinion requested.

Your letter states:

"I shall appreciate an opinion from you as to whether the funds representing the outstanding certificates of The Morris Plan Company of Kansas City in the amount of \$1,400 should be turned over to this Department and deposited in accordance with the provisions of Section 7897 of the Revised Statutes of Missouri, 1939."

That part of Section 7897, Article 1, Chapter 39, R.S. Mo. 1939, defining the authority of the Commissioner of Finance to take over such funds as are referred to, is as follows:

"The commissioner may take and hold as trustee for the owners thereof any sums which remain due to and unclaimed by any creditor, depositor, stockholder or shareholder of any corporation, to which this chapter is applicable, after the completion of the voluntary or involuntary liquidation of the business and affairs of such corporation. * * *"

April 13, 1945

The statement of facts indicates that The Morris Plan Company was incorporated in 1916 as a general business corporation, but elected to come under the Loan and Investment Act by complying with Section 5425, R.S. Mo. 1939.

The Corporation Act, Laws of Missouri, 1943, page 502, and particularly Section 5425a thereof, l.c. 505, provides in part as follows:

"The Commissioner of Finance shall have and exercise the same supervision, authority and power over, and shall be charged with the same duties toward all corporations organized under the provisions of Article 8, Chapter 33, Revised Statutes of Missouri, 1939, as he now has and exercises and is charged with by law with reference to licensees under the provisions of Article 7, Chapter 39, Revised Statutes of Missouri, 1939, as far as the same may be applicable; * * *".

The statement of facts contains the further information that The Morris Plan Company has previously filed with the Secretary of State its certificate of dissolution and the company is now in process of liquidation. It is said that the company has redeemed all of its investment certificates, except such number thereof as aggregate the amount of \$1,400, the owners of which cannot be found. The meaning and effect of the word "organized" as used in that part of said Section 5425a above quoted, seems to be the difficulty in the case. The question being, whether it is used in the sense of the company having been "organized" originally under the Loan and Investment Act or whether it means "organized" and "operating" and "as now existing" under said Act, when and after the company elected to come under the Loan and Investment Act.

The primary rule of construction which guides the Courts in construing statutes, is to arrive at the correct understanding of the intention of the Legislature in passing an Act.

59 C.J. page 948, very clearly and fully states this rule as follows:

"As the intention of the Legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state, to the intention or purpose of the legislature as expressed in the statute. * * * , "

citing Missouri cases following the rule under Note 5.

Article 7, Chapter 39, R.S. Mo. 1939, relates to small loan companies.

Section 5425a, supra, in providing that the Commissioner of Finance should have all the authority over, and be charged with the same duties toward, corporations organized under Article 8, Chapter 33, Revised Statutes of Missouri, 1939, which relates to "Loan and Investment Companies", as he now has and exercises with reference to licensees under Article 7, Chapter 39, R.S. Mo. 1939, which relates to small loan companies, makes it evident that the Legislature was using the word "organized" in its present tense, and was aware of the right and practice of corporations, organized originally as general business corporations, when desirable, to elect to come under the Loan and Investment Act by complying with Section 5425, R.S. Mo. 1939, and that they would then "be entitled to all provisions of this article", etc. Until a company, desiring to make such change of corporate existence had complied with the terms of said Section 5425, it could not be "organized", as a "Loan and Investment Company" but when so having complied with the terms thereof, may it not well be said that the Legislature intended that they would thus be "organized" in the present tense of the word? We think the Legislature so intended, and that when such terms are so complied with, a corporation would be "organized" under said Loan and Investment Act. We find no Missouri case construing these statutes or interpreting their meaning under the state of facts here existing. Webster's International Dictionary, page 1719, defines "organized" as: "Having organization", as being in the present tense.

The case of Bingham et al. vs. Savings and Investment & Trust Co. of East Orange et al., (N.J.), 138 Atl., page 659,

April 13, 1945

is a case construing a statute using the word "organized" and its applicability to other statutes under a state of facts very similar to the facts and statutes here being considered. The facts in that case were, that a Savings Investment Company, under the Trust Company & Bank Merger Act of New Jersey of 1925, had merged with a bank, and the question arose whether the said Savings Investment Company was of the class of trust companies authorized to so merge, since it was originally "organized" under the Safe Deposit and Trust Company Act of said State. The further question was, to determine whether the corporation should be considered "organized" under the Act, permitting the merger and as the result thereof, or whether it referred to its original creation. In holding that the New Jersey statute expressed the intention of the Legislature of that State to use the word "organized" in the sense of "operating" instead of as "created", the Chancery Court of New Jersey, l.c. 661, 662, said:

"The next objection is that the Savings Investment Company is not one of the class of trust companies authorized to merge. The assertion is literally true. The Merger Act of 1925 (P.L. p.481) authorizes one or more trust companies organized under an act concerning trust companies (Revision 1899 (P.L. p. 450; 4 Comp. St. 1910, p. 5654)), or under any special act, to merge with banks. As we have seen, the Savings Investment Company was organized under the Safe Deposit and Trust Company Act of 1885. When the revision of 1899 came into being, for the formation thereafter of trust companies with enlarged powers and increased facilities for management and regulation, the act of 1885 (P.L. p. 270) was repealed, and companies theretofore created under general laws or special act were afforded the privileges of the revised act, and accordingly the Savings Investment Company accepted the grant by amending its charter. It was further provided that the revised act shall be applicable to all trust companies theretofore formed, reserving to them all their rights and powers and retaining their liabilities. All trust companies were operating under the Revision of 1899 at the time the Merger Act was passed in 1925, and it is plain, beyond question, that it was

the intention of the Legislature to embrace all trust companies, however created, for no reason is apparent why the few formed under the act of 1885, and they are the only ones omitted, should be excluded. 'Organized' was not used to denote 'created,' but in the sense of 'operating'. This interpretation is consistent with the legislative scheme, and it may be said with assurance that the Savings Investment Company, by the bestowal of power of the Revision of 1899, and amending its charter, and availing itself of its privileges, was 'organized' under that act, within the purview of the Merger Act. * * * "

It is believed that the New Jersey case quoted, furnishes sufficient authority as a precedent, in the absence of a decision by our own courts construing these statutes, warranting the conclusion that the Legislature intended that the word "organized" in said statute in the sense of "operating" and existing after a company organized under the general business corporation statute, has elected to come under the Loan and Investment Act.

CONCLUSION.

It is, therefore, the opinion of this Department, under the facts stated in this case, that the funds representing the outstanding certificates of The Morris Plan Company of Kansas City, Missouri, in the amount of \$1,400.00, should be turned over to the Department of Finance to be held by the Department, as trustees for the owners thereof, upon the conclusion of the liquidation of said company, under the terms and provisions of Section 7897 of the Revised Statutes of Missouri, 1939.

Respectfully submitted,

GEORGE W. CROWLEY,
Assistant Attorney-General

APPROVED:

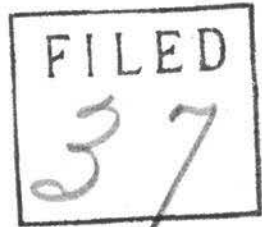
J. E. TAYLOR
Attorney General

GWC:ir

LOAN AND INVESTMENT COMPANIES:

Procedure by Commissioner of Finance to revoke license.

April 27, 1945



Honorable D. R. Harrison
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Harrison:

Your letter of March 21, to General Taylor, requesting an opinion from this Department on the matters mentioned in your letter, has been received, and the writer has been directed to prepare the opinion.

Your letter states:

"Sometime ago this Department received a complaint from Mr. John R. Baker, 5655 Maple Avenue, St. Louis, 12, Missouri, against the Local Finance Company, 5899 Easton Avenue, St. Louis, Missouri.

"An investigation of the complaint was made by Mr. George E. Deutschman, Examiner in this Department, and from the report on the investigation I find that the transaction was handled by the Local Finance Company in the following manner:

"Mr. Baker purchased a 1940 Plymouth automobile from Forrest F. Heinritz, a fellow employee at McQuay-Norris for a price of \$850 and paid \$250 cash out of his own pocket on this deal. To pay the balance of \$600 he went to the Local Finance Company to borrow the money. The Local Finance Company sold him insurance at a premium of \$18 and for the \$618 charged Mr. Baker \$806.25 on a 15-month payment plan of \$53.78 per month. Mr. Baker prepaid the account in full on

April 27, 1945

January 12, 1945, about five months after the loan was made. At the time the loan was made the Local Finance Company engaged in the subterfuge of having the note made payable to Forrest Heinritz and having him endorse it over to the Local Finance Company, without recourse. The card on the transaction in the office of the Local Finance Company shows the following:

| | |
|-----------|-----------------|
| "Loan | \$600.00 |
| Insurance | 18.00 |
| Charges | 188.25 |
| | <u>\$806.25</u> |

"Local Finance Company, 5899 Easton Avenue, St. Louis, Missouri, is licensed by this Department under the Loan and Investment Act.

"The Local Finance Company has violated the provisions of the Loan and Investment Act, and it is my opinion that its officers should be required to appear in this office for a conference to show cause why its license to conduct a Loan and Investment business should not be revoked.

"I shall appreciate an opinion from you regarding this matter and outlining the procedure to follow. In the event a conference with the officers of the Local Finance Company is scheduled, will you or one of your Assistants arrange to be present."

The Local Finance Company is said in your letter to be licensed by the Finance Department under the Loan and Investment Act, which is Article 8, Chapter 33, R.S. Mo. 1939, and which contains the new sections thereto added by the Laws of Missouri, 1943, page 502.

Sections 5421, 5422 and 5423 of said Article 8, Chapter 33, were repealed by said Laws of 1943, and five new sections known as Sections 5421, 5422, 5422a, 5423 and 5425a were enacted in lieu thereof.

April 27, 1945

Sections 5418, 5419, 5420 and 5425 were not repealed by the Act of 1943, and remain as a part of the revision of 1939.

Section 5425a, Laws of Missouri, 1943, page 505, points out the powers of the Commissioner of Finance over Loan and Investment companies. That part of said Section giving the Commissioner powers incident to the matter being here considered, is as follows:

"The Commissioner of Finance shall have and exercise the same supervision, authority and power over, and shall be charged with the same duties toward all corporations organized under the provisions of Article 8, Chapter 33, Revised Statutes of Missouri, 1939, as he now has and exercises and is charged with by law with reference to licensees under the provisions of Article 7, Chapter 39, Revised Statutes of Missouri, 1939, as far as the same may be applicable, * * *

The above quoted provision of said Section 5425a gives the Commissioner of Finance authority and power over, and charges him with the same duties toward all corporations organized under the provisions of said Article 8, Chapter 33, (Loan and Investment Companies), as he now has and exercises, and is charged with by law with reference to licensees under the provisions of Article 7, Chapter 39, R.S. Mo. 1939 (Small Loan Companies), as far as the same may be applicable.

The power to be exercised by the Commissioner of Finance over "licensees" under said Article 7, Chapter 39, among others are:

- 1) Under Section 8159, Article 7, Chapter 39, the power of investigation and determination whether any company operating under said Article and Chapter, is obeying the laws of this State, and,

- 2) Under Section 8155, to revoke the license of any company violating any of the provisions of Article 8, Chapter 33, R. S. Mo. 1939, to which such powers are extended by the terms of said Section 5425a. That part of said Section 8155 referred to is as follows:

April 27, 1945

"The licensing official may, upon notice to the licensee and reasonable opportunity to be heard, revoke such license if the licensee has violated any provision of this article; * * * "

Whether or not the said Local Finance Company has violated any provision of said Article 8, Chapter 33, is a question of fact.

Your letter indicates that you have made the investigation authorized under said Section 8159, R. S. Mo. 1939, and you state further that this company "has violated the provisions of the Loan and Investment Act," and it is your belief "that its officers should be required to appear at your office for a conference to show cause why its license to conduct a Loan and Investment business should not be revoked."

The Department of Finance has the right to make further investigation of this company's affairs, and especially the loan in question, and to this end would be justified in requiring said company to appear at the office of the Department of Finance to disclose any and all facts relevant to the particular case, or its business generally, that the Department desires to learn. But, if the effort is one to revoke the license of this company it will be necessary, under the terms of said Section 8155, to give the licensee a hearing, after due notice, upon any charge that the company has violated such laws. These charges must be in writing and must state the violations of the laws of which the licensee is said to be guilty.

Our Appellate Courts have ruled that in such matters as the revocation of a license, State officials have only such powers as are expressly conferred upon them by law. This rule of law was stated by our Supreme Court in the case of State ex rel. Banister et al., v. Cantley, 52 S.W. (2d) 397, 1.e. 398, as follows:

"The functions of the finance commissioner, like any other official, are limited to the powers and duties imposed upon him by the statute which creates the office. 46 C.J. 1031; State ex rel. Bradshaw v. Hackmann, 276 Mo. 600, 208 S.W. 445; Lamar Township v. City of Lamar, 261 Mo. loc.

cit. 189, 169 S. W. 12, Ann. Cas. 1916D, 740.

"An official such as the finance commissioner has no implied powers except such as are necessary to the effective discharge of the powers expressly conferred. 46 C.J. 1032."

Under the above authority, the acts constituting such violation must be set forth, reasonable notice must be given, and opportunity to be heard, must be given the company named. By the terms of that part of said Section 8155, above quoted, the burden would be upon your office to prove the acts charged as violations of said Article 8, Chapter 33. The statute, by stating that the company shall be given a reasonable opportunity to be heard means that it may appear in its own defense, and does not mean that the burden is cast upon the company of proving its innocence. The statute does not so provide. Such statutes must be strictly construed against the State and liberally construed in favor of said company.

This question of the construction of statutes providing for the revocation of a license, as penal statutes, was considered by our Supreme Court in the case of State ex rel. v. Robinson, 253 Mo. 271, l.c. 284, 285, where the Court said:

"The next preliminary question which arises in the case, is, shall that part of section 8317, supra, which authorizes the Board of Health to revoke licenses of physicians, be adjudged a remedial or a penal statute? If remedial, it must be liberally construed in behalf of both respondents and appellant, while if it be a penal law, it must be strictly construed against the respondents, as the representatives of the State, and liberally construed in favor of appellant. (State v. Balch, 178 Mo. 392; State v. Kooek, 202 Mo. l.c. 235; State v. McMahon, 234 Mo. l.c. 614.)

"This rule is announced in 2 Lewis' Sutherland's Statutory Construction (2 Ed.), section 531:

April 27, 1945

"Among penal laws which must be strictly construed, those most obviously included are all such acts as in terms impose a fine or corporal punishment under sentence in State prosecutions, or forfeitures to the State as a punitive consequence of violating laws made for preservation of the peace and good order of society. But these are not the only penal laws which have to be so construed. There are to be included under that denomination also all acts which . . . take away or impair any privilege or right."

"A statute which provides for the disbarring of attorneys has been held to be a penal law. (Moutray v. People, 162 Ill. 194.)

"A penal statute is construed with a degree of strictness commensurate with the severity of the penalty it imposes, and where the penalty, as in this case, is onerous, no one can be held to have violated its provisions unless his acts come within both the letter and the spirit of the law. (2 Lewis's Sutherland's Statutory Construction (2 Ed.), sec. 520-1; State ex inf. v. Railroad, 238 Mo. 605, l.c. 612.) All laws, however, must receive a rational, and not an arbitrary, construction.

"Upon the well-considered precedents we have no hesitation in holding that the law no in judgment, in so far as it authorizes the revocation of licenses of physicians, is highly penal, and must be treated as a penal law."

From the statement of facts in your letter there is no detailed statement of what you consider to be acts by this company which violate the Loan and Investment Act.

It may be that investigation has determined or might yet determine, that this company had no right to

April 27, 1945

charge the 2% if they did charge it, mentioned in the third paragraph of Section 5421, Laws of Missouri, 1943, page 504, for examination and investigation, drawing papers and taking acknowledgment of papers in making the loan.

It may be that such investigation would determine that they had no right to charge a 5% charge, if they did charge it, as is provided for in the fourth paragraph of said Laws, page 504, or

It might, under investigation, be developed as a fact, that this company failed to refund, under the terms of Section 5422a of said Act of 1943, page 505, interest due the borrower on the loan for the remaining ten months of the period of the loan, it appearing that the loan was discharged in full on January 12, 1945.

Tracing the charges permitted to be made under the terms of Section 5421, Laws of Missouri, 1943, it appears that this company has made charges far in excess of those permitted by the statute on such a loan. However, speculation, or mere appearances, will not be sufficient evidence of violations of these statutes upon which to base an order to revoke the license of this company. The Department of Finance should develop such facts of violations by this company as will make a clear, definite charge and statement of such violations, and proof of such facts as may be charged must be supplied by either direct or circumstantial evidence to establish the truth of such charges as the basis for the revocation of the license of this company. This Department will be glad to assist in any way you may desire.

An Assistant will be detailed to attend any conference or proceeding in relation to the matter when you may call for assistance.

CONCLUSION.

It is, therefore, the opinion of this Department that definite charges in writing must be made against this company, and proof submitted in support thereof to establish actual violations of the provisions of Article 8, Chapter 33, R. S. Mo. 1939, as amended by the said Act of 1943,

April 27, 1945

and that the said company will be entitled to a copy of such charges served upon it, together with due notice of the time and place of the hearing, as the necessary procedure before its license may be revoked.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney-General

APPROVED:

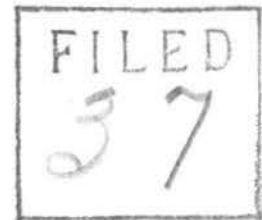
J. E. TAYLOR
Attorney-General

GWC:lr

CORONER: RE: The coroner should hold an inquest in connection with the performing of an autopsy & it is within the discretion of the county court to pay for the performance of a post-mortem examination.

SHERIFFS: RE: Whether the sheriff is entitled to a fee for driving insane persons, who have escaped from another state to the Missouri State line.

September 24, 1945



Honorable Leo J. Harned
Prosecuting Attorney
Sedalia, Missouri

Dear Mr. Harned:

Your letter of September 5, 1945, requesting an opinion of this department has been received. Your letter reads as follows:

"Will you give me an opinion on the following:

"1. Does the coroner have to hold an inquest prior to doing a post-mortem examination or vice-versa?

"2. Where the coroner performs a post-mortem, is it within the discretion of the County Court to refuse to pay for the same?

"3. Also, where inmates of an insane asylum escape into this State from another State, and the State refuses to come and get them, is the Sheriff entitled to a fee for delivering said inmates to the State line, which the County Court has to pay."

For purposes of clarity we will consider each of the questions which you propounded in your letter separately.

Question I

Regarding question (1) of your letter, we refer you to the following sections of the Revised Statutes of Missouri, 1939.

Section 13231, R. S. Mo. 1939, reads as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to

have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

Section 13257, R. S. Mo. 1939, reads as follows:

"Whenever the coroner, being himself a physician or surgeon, shall conduct a post-mortem examination of the dead body of a person who came to his death by violence or casualty, and it shall appear to the county court that such examination was necessary to ascertain the cause of such person's death, the county court may allow the coroner therefor an additional fee, not exceeding twenty-five dollars, to be paid as his other fees in views and inquests; but section 13250 shall not be construed to apply to any such examination when made by the coroner himself."

Section 13258, R. S. Mo. 1939, reads as follows:

"Whenever an inquest shall be held, and the coroner shall have good reason to believe that the deceased came to his death by poison administered by the hand of some person other than the deceased, he may, at the request of the jury, cause chemical analysis and microscopical examination of the body of the deceased, or any part of it, to be made; and the testimony of medical and chemical experts may be introduced for the purpose of showing how and in what manner the deceased came to his death;* * *"

The cases hold that the coroner has no authority to perform or have performed an autopsy unless it is in connection with an inquest. (Patrick v. Employers Mut Liability Ins. Co. et al. 118 S. W.(2d) 116, 233 Mo. App. 251; Crenshaw v. O'Connell, (1941 Mo.) 150 S. W. (2d) 489, 235 Mo. App. 1085.

The Crenshaw case was one in which the coroner of St. Louis County was sued for damages for performing an illegal autopsy and causing the plaintiff, wife of the deceased, mental suffering and anguish. The coroner himself performed the autopsy without first ordering an inquest. The jury in the trial court returned a \$5,000.00 verdict against the defendant. Defendant appealed. The St. Louis Court of Appeals affirmed the judgment but reduced the damages to \$1500.00. In referring to the authority of the Coroner in relation to autopsies, the court said:

"(1) The coroner, as we know him in this state, is a constitutional officer, Mo. St. Ann. Const. art 9, Sections 10 and 11, whose powers and duties with respect to the holding of inquests and autopsies are more or less specifically defined and limited by statute, the same being Sections 13227-13268, R. S. Mo. 1939, Mo. St. Ann. Sections 11608-11649, pp. 4279-4290.

"The above sections of the statutes have but recently been construed (and we think correctly so) by the Kansas City Court of Appeals in the case of Patrick v. Employers Mutual Liability Insurance Co., 233 Mo. App. 251, 118 S. W. (2d) 116, an action by a widow against a compensation insurer for damages sustained on account of the mutilation of her deceased husband's body in connection with an autopsy which the coroner unlawfully permitted to be performed at the instance and for the benefit of the defendant insurer.

"(2-5) That case holds squarely that under such circumstances as confronted defendant in the case at bar, the law invests the coroner with no authority to have an autopsy performed except in connection with, and as an incident to, an inquest to be held before a jury upon the body of a person supposed to have come to his death by violence or casualty, the purpose of the inquest being to inquire, upon a view of the body, how and by whom such person came to his death; that while the coroner acts judicially, and has a discretion, with respect to determining whether an inquest shall be held, neither the inquest itself, nor the calling and holding of an autopsy in

connection with it, is a proceeding judicial in character so as to relieve the coroner from civil liability for his acts in relation to it; that it was never intended that the coroner should have the right to order an autopsy performed in any case where, in his mere judgment, an autopsy might be deemed proper for any such reason as the advancement of science or the like; and that while it might or might not be thought desirable that the coroner should have the power to hold an autopsy in order to determine whether an inquest should be held, the law gives him no such authority, so that in the case at least of a person who is merely supposed to have come to his death by violence or casualty, an autopsy performed except in connection with an inquest is unlawful and illegal, regardless of what might be the coroner's good faith in the exercise of a mistaken authority in the matter."

Sections 13231, supra, 13257, supra, and 13258, supra, all deal with the same general subject and are in pari materia. In order to ascertain the legislative intent, statutes in pari materia must be construed in connection with each other and the legislative intent gathered from a reading of all of them together. (Holder v. Elms Hotel Co., 92 S. W. (2d) 620, 338 Mo. 857; State ex rel. McKittrick v. Carolene Products Co. 346 Mo. 1049, 144 S. W. (2d) 153 Sharp v. Producer's Produce Co. 47 S. W. (2d) 242, 226 Mo. App. 189.)

Section 13231, supra, prescribes the first duty of the Coroner. He must " * * * so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, * * * make out his warrant, directed to the constable * * *, requiring him forthwith to summon a jury of six good * * * men, * * * to inquire, * * *, how and by whom he came to his death." This section leaves no doubt but that the inquest is to be held at once and without delay. The section also indicates the purpose of holding an inquest. The duty of determining the cause of death is placed squarely upon the inquest jurors, not upon the coroner. It follows that any autopsy should, therefore, be held as an incident to the inquest.

Section 13257, supra, provides additional compensation for the coroner where he performs an autopsy himself. This section provides

that it must appear to the County Court that such autopsy was necessary. If the inquest jurors could determine the cause of death without an autopsy such autopsy would obviously not be necessary. It is patent, therefore, that an autopsy must be held as an incident to and part of an inquest.

Section 13258, supra, deals with procedure in poison cases. It provides that in such cases, the coroner may cause an investigation of any part of a body (an autopsy) at the request of the inquest jurors and that it shall be performed, "Whenever an inquest shall be held, and the coroner shall have good reason to believe that the deceased came to his death by poison* * *." Clearly, under this section, the autopsy must be held as an incident to the inquest. The statute provides that the inquest jurors may request it during their examination of the cause of death.

From an examination of these three sections together we think it is clear that the intention of the legislature was that an inquest should be started before an autopsy is performed and the autopsy should be an incident to the inquest. The Crenshaw and Patrick cases, holding as they do, that an autopsy must be held in connection with an inquest and making it unlawful to do otherwise, provide further authority for arriving at such a conclusion.

Question II

Regarding question (2) we refer you to Section 13257, R. S. Mo. 1939, which reads as follows:

"Whenever the coroner, being himself a physician or surgeon, shall conduct a post-mortem examination of the dead body of a person who came to his death by violence or casualty, and it shall appear to the county court that such examination was necessary to ascertain the cause of such person's death, the county court may allow the coroner therefor an additional fee, not exceeding twenty-five dollars, to be paid as his other fees in views and inquests; but section 13250, shall not be construed to apply to any such examination when made by the coroner himself."

Whether the county court may refuse to pay for an autopsy performed by the coroner turns upon the determination of whether the above section is mandatory or directory. It will be noticed that this section uses the word "may" in allowing the coroner an additional fee for performing an autopsy.

In determining whether a statute is directory or mandatory the

prime object is to ascertain the legislative intention disclosed by statutory terms and provisions in relation to subject of legislative and general object. (State ex rel. Hay v. Flynn, 147 S.W. (2d) 210, 235 Mo. App. 1003; Kansas City v. J. I. Case Threshing Machine Co., 87 S. W. (2d) 195; State ex rel. Ellis v. Brown, 33 S.W. (2d) 104, 326 Mo. 627.

The words "may," "must," and "shall," are used interchangeably in statutes without regard to their literal meaning and are to be given the effect which is necessary to carry out the intention of the Legislature as determined by ordinary rules of construction. (Kansas City v. Case Threshing Machine Co., supra.) Section 13257, supra, must be construed according to the above canons of statutory construction.

We think it is clear that the legislature intended that Section 13257, supra, should be mandatory in regard to the payment of a fee to the coroner for conducting an autopsy provided that the performing of same was necessary and was in connection with an inquest. To conclude that the Legislature intended that the county court could arbitrarily refuse to pay a coroner when he performed additional work, is not tenable. There is no provision in the other statutes allowing the coroner compensation for this additional work and therefore it cannot be said that he has already been compensated for such service. We think the Legislature did not expect the coroner to do extra work and not be compensated therefor. Furthermore, to take the view that the payment of the fee was arbitrarily vested in the county court would render section 13257, supra, mere surplusage and the effect would be to render nugatory the provisions of that section since its purpose obviously was to provide compensation for extra work which was to be performed. A statute will not be construed so as to make an act of the Legislature a vain and useless one or to render it nugatory. (State v. Ball, 1943 Mo. App.) 171 S. W. (2d) 787; State ex rel. McAlister v. Dunn (Mo. 1919) 209 S. W. 110.)

We are, therefore, of the opinion that the legislative intent regarding section 13257, supra, was that it was the duty of the county court to pay the coroner for conducting a necessary autopsy in connection with an inquest. By the terms of the section, however, the county court does have discretion in the matter of whether or not a post-mortem examination was necessary to ascertain the cause of a person's death. This discretion is vested in the county court by the expressed terms of the statute and lies nowhere else.

We refer you to section 13411, R. S. Mo. 1939, relating to the fees allowed the sheriff for the performance of his duty in civil cases, which reads as follows:

"Fees of sheriffs shall be allowed for their services as follows:

| | |
|---|--------|
| For summoning a standing jury | \$8.40 |
| For serving every summons or original writ and returning the same for each defendant..... | 1.00 |
| For serving a writ of <u>scire facias</u> or attachment for each defendant. | 1.00 |
| For taking and returning every bond required by law. | .50 |
| For serving a writ or order of injunction for each defendant. | 1.00 |
| For serving a <u>habere facias possessionem</u> or sequestration | 2.00 |
| for levying every execution. | 1.00 |

* * * * *

| | |
|---|--------|
| "For making, executing and delivering a sheriff's deed to be paid by the purchaser, all tracts of land purchased at the same sale to be included in one deed, if the purchaser desires it. | \$2.50 |
| For every return of <u>non est</u> on a writ original of judicial. | .50 |
| For return of <u>nulla bona</u> | .50 |
| For executing a writ of <u>ad quod damnum</u> in any case drawing the inquisition and returning the same. | 2.00 |
| For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip | .10 |
| For summoning a jury in case and calling the same at trial.- | 1.00 |
| For executing and returning a special <u>venire facias</u> | 2.00 |
| For summoning each witness .0---- | .50 |
| For return of <u>non est</u> on a subpoena | .25 |

| | |
|---|------|
| For serving every notice or rule of court, notice to take depositions or citation. ---- | .50 |
| For attending each court of record or criminal court and for each deputy actually em- ployed in attendance upon such court the number of such deputies not to exceed three per day. ----- | 3.00 |
| Except in cities and counties having a populat- ion of one hundred thousand inhabitants or over in which each deputy shall be allow- ed for each day during the term of said court. ----- | 3.00 |
| For every action called at each term. ----- | .05 |
| For calling each party. ----- | .05 |
| For calling each witness. ----- | .05 |
| * * * | |

Section 9355, R. S. Mo. 1939, provides compensation of sheriffs for removing patients to or from a state hospital, and reads as follows:

"To the Sheriff or other person for taking a patient to a state hospital or removing one therefrom upon the warrant of the Clerk, mileage going and returning, at the rate of ten cents per mile, and \$1.00 per day for the support of each patient on his way to or from the hospital shall be allowed; to each assistant allowed by the clerk and accompanying the Sheriff, or other person acting under the warrant of the clerk, \$4.00 per day for the time actually consumed in making said trip said sum, to include all expenses of such assistant. The computation of mileage in each case is to be made from the place of arrest to hospital by the nearest route usually traveled: Provided, that the said Sheriff shall furnish all necessary means of transportation without charge other than as above allowed. The cost specified in this Section shall be paid out of the County Treasurer of the proper county."

Section 497, R. S. Mo. 1939, relating to guardians and curators of insane persons, reads as follows:

"If any person, by lunacy or otherwise, shall be furiously mad, or so far disordered in his mind as to

endanger his own person or the person or property of others it shall be the duty of his or her guardian, or other person under whose care he or she may be, and who is bound to provide for his or her support, to confine him or her in some suitable place until the next sitting of the probate court for the county, who shall make such order for the restraint, support and safekeeping of such person as the circumstances of the case shall require."

Article II, Chapter 51, R. S. Mo. 1939, deals with the admission of patients to the state hospitals for the insane, and provides generally for the procedure of commitment and the requirements of admissibility of persons to the state hospitals.

Section 9356 of that Article provides in part as follows:

"No person shall be entitled to the benefit of the provisions of this article as a county patient, except persons whose insanity has occurred during the time such person may have resided in the state, and except the insane poor under sentence as criminals, as provided in Sections 9348 to 9352, inclusive, of this article.* * *"

An examination of Sections 9355 and 13411, supra, will reveal that there is no specific provision allowing the sheriff fees or mileage for transporting a person under the circumstances presented in your question III. A diligent search of the statute reveals that there are no other sections which give the sheriff any compensation in such a case.

It is a well settled rule that the right of a public official to compensation must be founded on a statute and that he may not receive compensation in addition to that provided by law. (Maxwell v. Andrew County, 146 S. W. (2d) 621, 347 Mo. 156; Smith v. Pettis County, 136 S. W. (2d) 282, 345 Mo. 839; Nodaway County v. Kidder, 129 S. W. (2d) 857, 344 Mo. 795.) It follows, therefore, that a sheriff is not entitled to a fee for performing the act set out in question three (3) of your letter.

CONCLUSION

It is, therefore, the opinion of this department, in regard to Question I of your letter, that a coroner must perform post-mortems

September 24, 1945

in connection with an inquest and that the autopsy should be performed subsequent to the beginning of the inquest, and that such autopsy must be performed only in connection with an inquest.

It is, therefore, the opinion of this department in regard to Question II that it is within the discretion of the county court to determine whether an autopsy was necessary to determine the cause of death of the deceased person and that if it determines that the autopsy was not necessary it may refuse to pay the coroner the fee provided in Section 13257, R. S. Mo. 1939, but that the county court is required to pay such fee where the determination has been that the autopsy was necessary and in connection with an inquest.

It is, therefore, the opinion of this department, regarding Question III of your letter, that the sheriff is not entitled to any fee for transporting the inmate of a foreign state insane asylum to the state line of Missouri.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:mw

SHERIFF'S FEES: May only receive compensation for days actually attending court.

January 27, 1945



Honorable Clyde V. Hastings
Prosecuting Attorney
Grant City, Missouri

Dear Mr. Hastings:

Under date of January 19th, 1945, you wrote this office requesting an opinion as follows:

"It has been the custom in this county for the Sheriff to receive a fee of \$3.00 for each day any court of record is in session, this under Section 13,411 Revised Statutes, 1939.

"Under the New Civil Code, Section 9, page 359, Laws of Missouri, 1943, it is provided that the circuit court shall be in session at all times.

"It sounds to me like the Sheriff might be entitled to collect a \$3.00 fee for every day in the year except Sundays and perhaps holidays."

The portion of Section 13411, R. S. Mo. 1939, referred to in your letter reads as follows:

"Fees of sheriffs shall be allowed for their services as follows:

* * * * *

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day \$3.00"

Section 9 of Committee Substitute for Senate Bill 34, Laws of Missouri, 1943, page 353, l. c. 359, is as follows:

"Every term of court shall commence and convene by operation of law at the time fixed by statute without any act, order, or formal opening by a judge, the judges, or other officials, and shall continue to be open at all times until and including the day preceding the next regular term on which day it shall expire by operation of law."

The language of Section 13411, supra, is "for attending each court of record," and Section 9 of Committee Substitute for Senate Bill 34, supra, requires the courts to remain open. This does not mean the courts shall be in session as the word "session" is generally understood with reference to courts, but only that terms may not be adjourned so that the judge may transact business at any time. In this connection it is desired to call attention to the interpretation of two fee statutes by the Federal courts:

"Rev. St. Sec. 829, 28 U. S. C. A., Sec. 574, which fixes the marshal's compensation for attending the Circuit or District Court while in session, means that the court is open by its own order for the transaction of business."

--McMullen v. United States, 13
S. Ct. 127, 146 U. S. 360,
36 L. Ed. 1007.

"The phrase 'in session,' within the meaning of a charge that accused used contemptuous words in the courtroom while the court was 'in session,' expresses not only the idea that at the time the judge was sitting on the bench and engaged in the discharge of official functions, but was also open

to the construction of meaning that the court had convened for a term and not adjourned."

--State v. Root, 67 N. W. 590,
595, 5 N. D. 487, 57 Am. St.
Rep. 568.

While these cases would not be binding upon courts of the State of Missouri, they would be highly persuasive.

In many circuits in this State it has been customary for the judge to hold each term open until time for the next term to convene. This created the same situation as is now produced by the new Code, and the sheriffs in these courts were allowed compensation for attending court on the days the court was in session and transacting business and not for days the court was in recess.

Conclusion

It is the opinion of the writer that a sheriff under the clause of Section 13411, quoted herein, would only be entitled to receive compensation for attending court for the days he actually attends upon which the court is open and transacting business or for days when he is attending by express order of the judge thereof although the court may not be transacting business.

Respectfully yours,

W. O. JACKSON
Assistant Attorney General

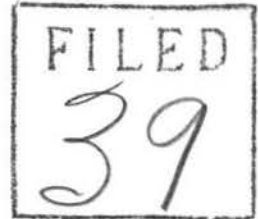
APPROVED:

HARRY H. KAY
(Acting) Attorney General

WOJ:EG

LIQUOR: May sell intoxicating liquor in the original package on the premise described in your request.

February 9, 1945



Mr. W. G. Henderson, Supervisor
Department of Liquor Control
State of Missouri
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of February 7, 1945, which request reads as follows:

"I have a matter on which I would appreciate an opinion from your office based on the following set of facts.

"The Hotel Russell in Charleston, Missouri, is owned by J. R. Marable and Lola Martha Marable, his wife, by the entirety. The hotel consists of three stories with a full basement below. The construction of the basement is as follows: There is a stairway leading from the sidewalk down to a door which opens into the south side of the basement. The door opens into a square room or hallway; to the left, upon entering, is another door which leads into a long room which is completely enclosed by solid walls. Inside this room is a soda fountain, tobacco and package liquor store.

"To the right, upon entering the hallway, is a door leading into another part of the basement which is enclosed by solid walls in which is located booths, tables and chairs and a music machine. The entrance leading into the liquor store and to the large room having tables and chairs have separate street numbers.

February 9, 1945

"J. R. Marable is the holder of a package liquor license described in his application as the room before designated as the liquor store.

"George N. Marable, son of the owners of the hotel building, rents the room at the right in which are located booths, etc., which room is known as "The Cellar". It is a practice for persons to purchase liquor in the package in the liquor store and go into the "Cellar" where they are served set-ups, ice and soda, and are allowed to drink. Also, the "Cellar" has several waiters who, upon customers' requests, will purchase soda for them at the soda fountain and bring it to them in the "Cellar". George Marable is holder of a license to operate a music machine in the city and pays a federal tax in lieu of the conduct of the "Cellar" as a place of business.

"We wish to inquire whether or not the construction of the building with its ownership and operation are such as to permit the operation of the two places of business within the keeping of the law.

"I am enclosing herewith a rough sketch which will more properly describe the places concerned."

Section 4897, Revised Statutes of Missouri 1939, provides that every license issued under the Liquor Control Act shall describe the premises with particularity at which intoxicating liquor may be sold thereunder, and said licensee shall not sell intoxicating liquor at any other place than described in the permit. Section 4897 reads as follows:

"On approval of the application and payment of the license tax herein provided, the supervisor of liquor control shall grant the applicant a license to conduct business in the state for a term to expire with the thirtieth day of June next succeeding the date of such license. A separate license shall be required for

each place of business. Of the license tax to be paid for any such license, the applicant shall pay as many twelfths as there are months (part of a month counted as a month) remaining from the date of the license to the next succeeding July 1st. No such license shall be effective, and no right granted thereby shall be exercised by the licensee, unless and until the licensee shall have obtained and securely affixed to the license in the space provided therefor an original stamp or other form of receipt issued by the duly authorized representative of the federal government, evidencing the payment by the licensee to the federal government of whatever excise or occupational tax is by any law of the United States then in effect required to be paid by a dealer engaged in the occupation designated in said license. Within ten days from the issuance of said federal stamp or receipt, the licensee shall file with the supervisor of liquor control a photostat copy thereof, or such duplicate or indented and numbered stub therefrom as the federal government may have issued to the taxpayer with the original. Every license issued under the provisions of this act shall particularly describe the premises at which intoxicating liquor may be sold thereunder, and such license shall not be deemed to authorize or permit the sale of intoxicating liquor at any place other than that described therein. Applications for renewal of licenses must be filed on or before the first day of May of each calendar year."

Furthermore, the Department of Liquor Control of the State of Missouri promulgated Regulation 1, subdivision (J), which defines premises as used in the Act as follows:

"Premises. - Is the place where intoxicating liquor or nonintoxicating beer is sold and it may be one room, a building comprising several rooms or a building with adjacent or surrounding land such as a lot or garden."

The Department of Liquor Control also adopted Regulation 12, subdivision (B), which deals with the licensee operating more than one business in the same building, and provides that each premise shall have a separate entrance and different street address so as to indicate that each business is run separately and distinct from each other. Subdivision (B) of Regulation 12 reads as follows:

"Partitions - Separate Businesses. -
If any retail permittee holds more than one kind of permit for separate business, in the same building, then such building shall be partitioned in such manner that the partitions shall run from the front of the building to the rear of the building, from the ceiling to the floor, and be permanently affixed to the ceiling, floor, front and rear of said building in such manner as to make two separate and distinct premises. There shall be a separate entrance in front of each of the premises and each of the premises shall have a different street address, so as to sufficiently indicate that said businesses are run separately and distinct from each other and not in conjunction with each other. In addition, the business maintained on each of the said premises must be manned and serviced by an entirely separate and distinct group of employees, and there shall be no buzzers, bells or other wiring or speaking system connecting one business with the other. Separate files, records and accounts pertaining to the business must be maintained."

The authorities have defined premises as used in describing a place to sell intoxicating liquor as a distinct and definite locality, a fixed cite capable of being located. In *State v. Fezzette*, 69 A. 1073, 1075, 103 Me. 467, the court in defining premises said:

"The word 'premises,' as used in Rev. St. c. 29, Sec. 49, commanding an officer to enter the place or premises before named and therein to search for intoxicating liquors, signifies it as a distinct and definite locality. It may mean a room or a shop or a building or a definite area, but in either case the locality is fixed; otherwise the use of the word would be misapplied."

In the case of *People ex rel. Chambers v. Shults*, 149 N. Y. S. 913, 915, 87 Misc. 348, we find the following definition:

"Held, that the term 'premises,' in section 17, means the place where liquors are authorized to be sold, and does not include relator's whole hotel, the town certificate only entitling him to sell in that portion of the building located in the town; * * * * ."

As we view the facts in your request for this opinion we are unable to find any reason why Mr. J. R. Marable should not be permitted to continue to operate and hereafter obtain a license to sell at retail intoxicating liquor in the original package on the same premises now occupied by him. It is not proper to deny him the right to sell such intoxicating liquor on said premises for the only reason that his son is operating another and a different kind of business in an adjoining room having an entirely separate entrance and no openings whatsoever between the two rooms. The only possible objection to such an arrangement, as we see it, might be in that the entrance to the licensed premise may be partially concealed from the street. However, from an examination of the attached drawing, apparently this entrance is not entirely concealed and the room or hall going from the street to the entrance of said building is rather large and open to the public at all times, since this licensed premise is located in a part of the hotel proper.

On January 17, 1938, this department rendered an opinion holding that a place may even be partitioned so as to constitute two premises, thereby permitting the sale of intoxicating liquor in the original package on one premise and beer by the drink on the other.

Therefore, under the facts stated in your letter and in view of the foregoing statutes and regulations of the Department of Liquor Control, we are of the opinion that the construction of the building wherein this licensee is located, and the ownership and operation of the two businesses mentioned in your letter, will not disqualify

February 9, 1945

the present licensee from carrying on under his original package license. Of course, if there is any collusion between the operators of the two establishments, then a different question would be presented, but your request does not indicate such to be the case.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

ARH:ml

REAL ESTATE COMMISSION:

Commission not authorized to revoke license on written statement or letter of complainants against licensee; Commission may not take depositions outside State.

February 9, 1945



Mr. John W. Hobbs, Secretary
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Dear Mr. Hobbs:

This will acknowledge receipt of the Commission's request for an opinion under date of January 30, 1945, as follows:

"Mr. Philip Lichtenstein, President of the Midwest Realty Corp. of St. Louis, which has been licensed, was formerly an officer of the Lichtenstein Estates, Inc. and as an officer of that company was convicted and fined in the United States Federal Court in St. Louis for an offense which happened before January 1, 1942 when the Missouri Real Estate License Law became effective.

"Since licensing the Midwest Realty Corp. as a Corporation and Mr. Philip Lichtenstein as its President, the Commission has been approached by the St. Louis Better Business Bureau and they filed with the Commission, photostatic copies of a form letter in which several citizens of the State of Illinois stated they had real estate dealings personally with Mr. Philip Lichtenstein in which they claim he made misrepresentations.

"The Opinion desired by this Commission is whether or not the photostatic copies could be used in a final determination on the revocation of the license of the Midwest Realty Corp. and its President, Mr. Philip Lichtenstein; or would it be necessary for these complainants to appear and

February 9, 1945

testify personally. Also, could the Missouri Real Estate Commission take depositions in the State of Illinois of these particular complainants, to be used at a hearing on the revocation of said license."

The Real Estate Commission Act, Laws of Missouri, 1941, page 424, et seq., provides that a license may be revoked on specified grounds by the Commission only after a hearing. The Act contemplates that a hearing be held and evidence heard bearing on charges set forth in Section 11 of the Act or upon a record showing of a conviction, during the term of the license, of certain offenses under Section 14 of the Act. The evidence at hearing under Section 11 of the Act, should be of witnesses or records and papers bearing on the complaint, or both.

Photostatic copies of a form letter signed by certain non-resident individuals claiming misrepresentations of licensee in dealings he had with them would be insufficient evidence at a hearing to justify a revocation of the real estate license by the Commission. Properly such a form letter presented to the Commission would merely serve the purpose of a complaint or request to the Commission for an investigation of the licensee. For cases as to the lack of evidentiary value of such letters and their insufficiency as evidence, see 32 C.J.S., Section 703, pages 601, 602; *Beckerleg vs. Locomotive Engineers' Mutual Life and Accident Insurance Company*, 274 S.W. 917.

If upon investigation, the Real Estate Commission goes forward with a proceeding to revoke the license of licensee, the individuals who signed the letter or complaint in question, should appear and testify to the charges in person before the Commission at a duly called hearing.

The authority of the Real Estate Commission to take depositions of witnesses in another State is controlled by Section 11 of the Real Estate Commission Act, which is in part, as follows:

"The Commission shall have the power to subpoena and bring before it any person in this state or take testimony of any such person by deposition with the same fees and mileage and in the same manner as prescribed by law in judicial procedure, before courts of this state in civil cases." (Under-scoring ours.)

This statute gives the Commission the power to subpoena and bring before it any person in this State, and the language of the statute also apparently limits the taking of depositions of witnesses to any such person in this State. If the Commission had not been limited by the wording of the statute to the taking of depositions of witnesses in Missouri, it would be authorized to take depositions outside the State as authorized in civil cases, by Article 4 of Chapter 9, R. S. Mo. 1939. Section 9990, R.S. Mo. 1939, authorizing similar procedure for the State Board of Health in the revocation of medical licenses provides greater latitude for the taking of depositions of witnesses in such cases by simply providing:

"* * * Testimony may be taken by deposition, to be used in evidence on the trial of such charges before the board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases."

However, in our opinion, the express wording of the Real Estate Commission Act limits the taking of depositions of witnesses to persons in this State.

CONCLUSION.

It is, therefore, the opinion of this Department that photostatic copies of a form letter charging misrepresentations in dealings with a real estate licensee, signed by several citizens living outside the State, would be insufficient as evidence to support the revocation of a real estate license. In such a case the complainants or witnesses should appear and testify in person, or their depositions taken within the State of Missouri, should be offered in evidence at a duly called meeting of the Commission.

The Missouri Real Estate Commission is not authorized to take depositions in a foreign State to be used in a hearing on the revocation of a license for the reason that the statute limits the taking of depositions in such cases to persons in this State.

Respectfully submitted,

APPROVED:

R. WILSON BARROW
Assistant Attorney General

HARRY H. KAY,
(Acting) Attorney General

RWB:lr

REAL ESTATE COMMISS : Banks and trust compan not required to secure real estate broker's license for the corporation to sell real estate loans, unless bank or trust company engages in the business of making loans for others.

May 4, 1945.



5-8

Mr. John W. Hobbs, Secretary
Missouri Real Estate Commission
Jefferson City, Missouri

Dear Mr. Hobbs:

The Attorney General acknowledges receipt of your letter of March 15, 1945, requesting an opinion on the following question:

"A number of banks and trust companies in St. Louis and Kansas City, as well as towns throughout the state, make a number of real estate loans which they do not hold in their portfolio, but sell to customers, and under the Missouri Real Estate License Law may we ask if such banks and trust companies are required to secure a real estate license for the corporation and such officers as actively engaged in this business."

Banks and trust companies organized and existing under the laws of the State of Missouri are authorized to do such business as set out by statute and the powers they may have and business they may do is provided for in their charters issued by the State Finance Commissioner.

Section 7949, R. S. Mo. 1939, prescribes the rights and powers with which every corporation shall be authorized and empowered, and provides in part as follows:

"1. To conduct the business of receiving money on deposit and allowing interest thereon not exceeding the legal rate or

May 4, 1945

without allowing interest thereon, and of buying and selling exchange, gold, silver, coin of all kinds, uncurrent money, of loaning money upon real estate or personal property, and upon collateral or personal security at a rate of interest not exceeding that allowed by law, and also of buying, investing in, selling and discounting negotiable and non-negotiable paper of all kinds, including bonds as well as all kinds of commercial paper; and for all loans and discounts made, such corporation may receive and retain in advance the interest: Provided, however, that no bank shall maintain in this state a branch bank, or receive deposits or pay checks except in its own banking house."

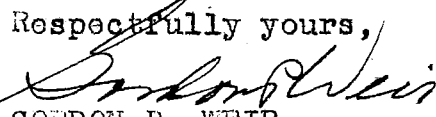
Section 3, page 425, Laws of Missouri, 1941, specifically sets out persons exempt by law from obtaining or securing a real estate license to carry on their business. That part of said section is as follows

"* * * This act shall not apply to * * *; nor any bank, trust company, building and loan association, insurance company or farm-loan association, organized under the laws of this state or of the United States when engaged in the transaction of business on its own behalf and not for others; * * *"

Conclusion

It is, therefore, the opinion of this department that a bank or trust company may sell real estate loans without obtaining a real estate broker's license. But if said bank or trust company engages in the business of making loans for others, it thus becomes subject to the law requiring it to have a real estate broker's license.

Respectfully yours,


GORDON P. WEIR
Assistant Attorney General

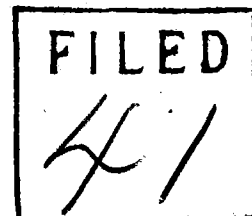
GPW:EG

APPROVED:

J. E. TAYLOR
Attorney General

CRIMINAL PROCEDURE: When and for what purpose a plea of nolo
contendere may be used as evidence.

June 5, 1945



Mr. J. W. Hobbs, Secretary
Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date, which reads as follows:

"Enclosed kindly find a photostatic copy which Mr. Rosenbaum of the Better Business Bureau of St. Louis, Missouri, requested that we send your office, along with the request for an opinion as to whether the plea of nolo contendere in the Federal Court is equivalent to a plea of guilty in which he cites some cases on the matter."

From a reading of the data attached to your letter, we conclude that you desire an opinion upon the legal effect of a plea of nolo contendere in a Federal Court in connection with your duties and functions under Sections 10 and 14 of the Missouri Real Estate Commission Act, Laws of Missouri, 1945, page 424.

Section 10 of said Act authorizes the Missouri Real Estate Commission to suspend or revoke the license of any real estate broker or salesman if the Commission finds that such broker or salesman has been guilty of certain conduct.

Section 14 of said Act reads as follows:

"Where during the term of any license issued by the commission the licensee shall

June 5, 1945

be convicted in a court of competent jurisdiction in the state of Missouri or any state (including federal courts) of forgery, embezzlement, obtaining money under false pretenses, extortion, criminal conspiracy to defraud, or other like offense or offenses and a duly certified or exemplified copy of the record in such proceedings shall be filed with the commission, the commission shall revoke forthwith the license by it theretofore issued to the licensee so convicted. No license shall be issued by the commission to any person known by it to have been convicted of forgery, embezzlement, obtaining money under false pretenses, extortions, criminal conspiracy to defraud, or other like offense or offenses, or association or copartnership of which such person is a member, or to any association or copartnership of which such person is an officer, or in which as a stockholder such person had or exercises a controlling interest either directly or indirectly."

Your request in reality involves two questions. The first one is whether a plea of nolo contendere entered by a defendant in a Federal Court to a criminal charge can be used as evidence in a proceeding by the Missouri Real Estate Commission under Section 10, supra, as proof that the defendant who entered said plea has been guilty of the conduct charged in the case in which he entered said plea.

The second question is whether a plea of nolo contendere entered by a defendant in a criminal case in a Federal Court amounts to a conviction of the defendant of the charges against him in said court so that same could be used in proceedings under Section 14, supra, as proof that a licensee, or applicant for a license, of the Missouri Real Estate Commission had been convicted of a crime.

There is only one case in Missouri in which the Supreme Court has discussed at length the legal effect of a plea of nolo contendere. That case is *Weibling et al. v. Terry*, 177 S.W. (2d) 502. The following is a portion of said discussion:

"It is settled that a plea of nolo contendere amounts to an implied confession of guilt and for the purposes of the prosecution is equivalent to a plea of guilty. The plea should not be used by one who has not violated the law. United States v. Norris, 281 U.S. 619, 50 S. Ct. 424, 74 L. Ed. 1076.

"The chief distinction of a plea of nolo contendere lies in the fact it is not a general admission of the truth of the facts charged as is a plea of guilty. It is a qualified admission limited for use only in the proceeding in which it is entered and may not be used as an admission in any other proceeding. Its utility was originally found in the class of cases where both a criminal prosecution and a civil suit arose out of the same act such as trespass for assault and battery. In such cases a plea of nolo contendere entered in the criminal prosecution furnished no admission of guilt to be used in the civil suit. On the other hand a plea of guilty in the criminal prosecution, being a confession of the truth of the charge, was available as an admission of the accused in the civil suit.

"We think the confusion in the cases considering convictions on pleas of nolo contendere result from a judicial practice of clothing the judgment of conviction with the characteristics of the plea or in speaking of the plea and the conviction as one and the same. For example, there are cases which hold that a judgment of conviction on a plea of nolo contendere may not be used as an admission of guilt. But a judgment of conviction could never be used as such an admission, regardless of the nature of the plea. It is the plea of guilty which carries the evidentiary force as an admission, not the judgment of conviction entered on the plea.

"Ordinarily a judgment of conviction in a criminal prosecution is not proof of anything in a civil proceeding except the mere fact of its rendition. By statute, in certain instances, a judgment of conviction has been given force because of the fact of its rendition. In such instances the judgment of conviction is made a basis for enforcing a statutory disability. Such statutes in no wise authorize the use of a conviction as an admission to be used to establish liability in a civil suit. Nor do the statutes make any distinction in convictions according to the nature of the plea resulting in such convictions. Nor is there any logical reason for a distinction. For statutory purposes a conviction on a plea of not guilty carries the same force as one entered on a plea of guilty."

As we interpret the above case, the court held that a plea of nolo contendere in a criminal case in a Federal Court is in effect a plea of guilty for the purposes of that case only, but that it is not such an admission by the defendant of the truth of the charges against him in said case as can be used against him in any other case; but that if a judgment of conviction is entered against such defendant in the Federal Court upon said plea of nolo contendere, the conviction is as complete and effective a conviction of the crime charged against the defendant as if said defendant had pleaded not guilty and had been found guilty as the result of a trial.

The foregoing case further discussed at length what constitutes a conviction in a criminal case. The court, l. c. 504, said:

"'Convicted' is generally used in its broad and comprehensive sense meaning that a judgment of final condemnation has been pronounced against the accused."

If, therefore, the defendant in a criminal case in the Federal Court enters a plea of nolo contendere, and upon said

June 5, 1945

plea a judgment pronouncing the defendant guilty is entered by the court and sentence is imposed, the defendant then stands convicted of the charges against him in that case. However, in any other proceeding such conviction could not be used for any other purpose than to prove that the defendant had in fact been convicted. It could not be used in any other proceeding to prove that he was in fact guilty of the charges of which he had been convicted. If, therefore, a proceeding is instituted against a licensee under the provisions of Section 14 of the Missouri Real Estate Commission Act, charging such licensee with having been convicted of a crime in the Federal Court, such charge could be proved by proof of a conviction against such licensee entered upon a plea of nolo contendere. However, if a proceeding is instituted before the Commission under the provisions of Section 10, supra, charging a licensee with certain conduct, the conviction of the licensee in the Federal Court entered upon a plea of nolo contendere to the same charges could not be used as evidence to prove the truth of the charges then pending before the Missouri Real Estate Commission.

Your attention is directed to the fact that conviction does not always follow a plea of nolo contendere in the Federal Court. Section 724, Title 18, U.S.C.A., provides:

"When it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby (the court) shall have power * * * * to suspend the imposition or execution of sentence and to place the defendant upon probation."

The practice of suspending the imposition of sentence is quite prevalent in the Federal Courts. If, therefore, a defendant enters a plea of nolo contendere and no judgment of conviction is entered, he has not been convicted of the charges to which he entered said plea. In the recent case of Meyer v. Missouri Real Estate Commission, 183 S. W. (2d) 342, the Kansas City Court of Appeals considered the effect of an order suspending the imposition of sentence entered upon a plea of nolo contendere without a judgment of conviction, and at the conclusion of the discussion said, 1. c. 346:

"Various Federal Courts of Appeals had held that where the sentence had been suspended there was no final judgment and no appeal was allowable, following cases, among others, of the Supreme Court of the United States. The Supreme Court in the *Korematsu* case, *supra*, referred to some of these cases where it was held that there is no final judgment in a criminal case prior to sentence, but did not overrule them. We are of the opinion that the two cases cited by the defendant on this point are not applicable, but that they fall into that class of cases mentioned in *People v. Fabian* and *Smith v. Commonwealth*, *supra*, as an appeal is merely a step in the particular case. However, where the reference is to the ascertainment of guilt in another proceeding (as here), and the question as to its bearing upon the status or rights of the individual in a subsequent case is under consideration, a broader meaning is to be attached to the word 'conviction', and a person is not deemed to have been convicted unless it is shown that a judgment is pronounced upon a verdict or plea of guilty. The rule is well stated in *People v. Fabian*, *supra*, as follows: 'Where sentence is suspended, and so the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so, also, the indirect consequences are likewise postponed.'"

In the *Meyer* case, just cited from, the court held that the Real Estate Commission could not substantiate charges against a licensee of certain conduct by proof that the licensee had entered a plea of *nolo contendere* in the Federal Court to charges of the same conduct when imposition of sentence was suspended and the defendant was placed on probation. Therefore, the Commission should look beyond a plea of *nolo contendere* to ascertain whether a judgment of conviction was entered upon such plea before it can consider said plea for any purpose.

Mr. J. W. Hobbs

-7-

June 5, 1945

CONCLUSION

It is, therefore, the opinion of this office that (1) a plea of nolo contendere entered by a defendant to criminal charges in the Federal Court cannot be used in any other proceeding except the one in which said plea was entered as evidence of the guilt of the defendant of such charges, but (2) that if a judgment of conviction is entered upon a plea of nolo contendere in the Federal Court, such judgment amounts to a conviction of the defendant of the charges to which he entered said plea, and such conviction can be used in any proceeding where it is sought to prove that the defendant has been convicted of such charges.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HHK:HR

MISSOURI REAL ESTATE
COMMISSION:

Power to issue license, minor.

August 10, 1945

FILED

41

10-1

Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Attention: Mr. John W. Hobbs, Secretary

Gentlemen:

Reference is made to your letter dated July 6, 1945, requesting an official opinion of this office, and reading as follows:

"The Missouri Real Estate Commission requests an opinion from your office on the following:

"Under the Missouri Real Estate License Law can the Commission issue a license to an eighteen year old boy applicant for a Salesman's license, working for a licensed Broker?"

"The Commission desires to be informed if it can license a minor under the present license law."

The definition of "real estate broker" is found in Section 3 of the act creating the Missouri Real Estate Commission and appears in Laws of 1941, page 425. Said Section 3 reads, in part, as follows:

"A real estate broker is any person, co-partnership association or corporation, foreign or domestic, who advertises, claims

to be or holds himself out to the public as a LICENSED real estate broker or dealer and who for a compensation or valuable consideration, as a whole or partial vocation, sells or offers for sale, buys or offers to buy, exchanges or offers to exchange the real estate of others; or who leases or offers to lease, rent or offers for rent the real estate of others; or who loans money for others or offers to negotiate a loan secured or to be secured by a deed of trust or mortgage on real property."

A further definition of the term "real estate salesman" appears in the same section. Such definition reads as follows:

"A real estate salesman, within the meaning of this act, is any person, who for a compensation, or valuable consideration becomes associated, either directly or indirectly with a real estate broker to do any of the things above mentioned, as a whole or partial vocation."

The requirements imposed upon persons seeking to be licensed as either real estate brokers or real estate salesmen appear in Section 7 of the act found in Laws of 1941, at page 427, which reads as follows:

"A license shall be granted only to persons who bear, and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent."

It is apparent from the foregoing that the requirements are directed solely to two qualifications: First, that the

applicant for the license be a person bearing a good reputation for honesty, integrity and fair dealing, and, second, that such applicant be a person who is competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom he represents.

While unquestionably a minor could meet the first requirement with respect to procuring a license, yet such minority, we believe, would become of paramount concern in determining his "competency."

"Competent" is defined in Words and Phrases, Perm. Ed., page 237, as follows:

"The word 'competent' means answering to all requirements; adequate; sufficient, suitable; capable, legally qualified; fit."

Under the law of Missouri, a person is a minor until having reached the age of twenty-one years. We quote, in part, from Section 374, R. S. Mo. 1939:

"All persons of the age of twenty-one years shall be considered of full age for all purposes, except as otherwise provided by law, and until that age is attained, they shall be considered minors:
* * * "

The general rule with respect to the rights of minors to hold public office is stated in 31 C. J., Infants, page 1004, as follows:

"At common law infants are eligible to offices which are ministerial in their character and call for the exercise of skill and diligence only; but they are not eligible to offices which are judicial or concern the administration of justice, nor should offices imposing duties to the proper discharge of which judgment, discretion and experience are necessary be intrusted to infants."

August 10, 1945

We believe that the duties which are imposed upon a real estate broker or real estate salesman are such that possibly would entail the exercise of judgment and discretion which necessarily could arise only from past experience, thereby coming within the last quoted clause of the rule as stated supra.

In the exercise of its discretion in granting or refusing licenses, the Missouri Real Estate Commission must necessarily be guided by certain general rules applicable to all boards or commissions having the right to pass upon the qualifications of persons seeking to exercise privileges. One of such rules is this, found in 37 C. J., Licenses, page 240:

"The power vested in the board or officer to grant licenses upon the applicant complying with the prescribed conditions, unless mandatory in terms, carries with it, either expressly or impliedly, the power of exercising, within the limits prescribed by the act or ordinance, a reasonable discretion in granting or refusing licenses. But this discretion must be exercised reasonably, and not arbitrarily, and furthermore arbitrary power in this respect ordinarily cannot be conferred on such board or officer. In exercising this discretion the board or officers should consider all the circumstances against, as well as in favor of, granting the license, and act in accordance with what they believe to be in the interest of the public safety or public welfare, and if for good reasons they are satisfied that the license ought not to be granted, they are justified in refusing it."

We think that this general rule, as applied to the functioning of your particular board, would have the effect of permitting the Missouri Real Estate Commission to make reasonable requirements as to past experience and to require the applicant to show that he has sound business judgment and discretion. If, under such rules, a minor were unable to qualify, we believe the Commission would be fully justified in refusing to

grant him a license for failure to establish himself as a "competent" person.

Further, we direct your attention to the following excerpt from 43 C.J.S. "Infants" page 162:

"* * * However, it has been said that, under the modern rule, this classification is abandoned in favor of permitting the infant, when he has become of age, to determine what contracts are, and what are not, to his interest and liking. The general rule, ignoring the distinction above made, is that, with certain exceptions, as in the case of contracts for necessities, as discussed infra Sec. 78, contracts authorized by law, and those entered into in the performance of a legal duty, and in some special cases of actual and active fraud, the contracts of an infant, whether executed or executory, are voidable, and such contracts of an infant are voidable at his election or option after attaining his majority, and not void, in the absence of a statute providing otherwise. In this connection it has been said that one deals with an infant at his peril, particularly when doing so with knowledge of his incapacity.

"The incapacity of an infant to bind himself by contract is not removed by the mere fact that he has no parent or guardian, or by the fact that he is employed and receiving his wages from the employment. The approval by a parent of his infant child's contract does not validate it. * * * * *

Also, the following excerpt from 27 Am. Jur. "Infants" page 770:

"The contract of an infant for his performance of labor or personal services is voidable at his election. If he wishes, he may refuse to perform, upon the ground that he is an infant, and his refusal does not

August 10, 1945

render him liable in damages. On the other hand, if the infant wishes, he may perform his part of the contract, and in case of a breach by the other party, a right of action upon the contract arises."

In view of the types of services to be performed by real estate brokers or salesmen, we believe the incapacity of infancy to be such as to render a "minor" incompetent within the meaning of Section 7, Laws of 1941, page 427. We are persuaded to this view particularly by the innumerable controversies that could so easily arise between principal and agent or employer and employee, when one of the contracting parties is a minor.

CONCLUSION

In the premises, we are of the opinion that the Missouri Real Estate Commission cannot issue a license to a minor as a real estate broker or real estate salesman for the reason that the inherent disabilities of infancy render such minor incompetent within the purview of Section 7, Laws of 1941, page 427.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

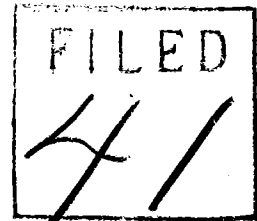
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

COUNTY: Re: The authorization of the County Court of Maries County to
COURTS: contribute funds of the County for the erection of a memorial building under Article II, Chapter 138, R. S. Mo. 1939.

October 18, 1945



Honorable W. H. Holmes, Representative
63rd General Assembly
State House
Jefferson City, Missouri

Dear Mr. Holmes:

We acknowledge receipt of your letter of October 3, 1945, in which you request an opinion of this office as follows:

"The present General Assembly of Missouri recently appropriated \$1,000.00 for Maries County under Art. 2, Chapter 138, R. S. of Mo. 1939, to be used in the construction of a Soldier's Memorial.

"Can the County Court of Maries County contribute such funds as they see fit and proper from the funds of said County, to aid in the construction of this memorial?"

You very kindly indicated to us that the General Assembly of Missouri recently approved \$1,000.00 for Maries County under Article II, Chapter 138, R. S. Mo. 1939, to be used in the construction of a soldier's memorial. The complete Article II of Chapter 138, R. S. Mo. 1939, to which you refer, is set out below.

Section 15444, R. S. Mo. 1939, reads as follows:

"In appreciation of the services rendered by the citizen soldiery of Missouri in the war against Germany and her allies and for the purpose of preserving the records and perpetuating the memory of their heroic achievements, a memorial building, monument or other suitable testimonial shall be erected or placed in each of the counties of the state and in cities not part of a county. Such memorial may be a building or a monument or in the form of tablets suitably inscribed and placed in some building at the county seat of such counties or at such places designated by the county

courts of said county and in said cities not part of a county. The exact nature of such memorial shall be determined by the county court of the county or by the municipal assembly of said city."

Section 15445, R. S. Mo. 1939, reads as follows:

"For the purpose of carrying out the provisions of this article the county courts of the several counties and the municipal assemblies of the said cities are authorized to erect said buildings, monuments or tablets and to do all things necessary to carry out the provisions of this article. Such county courts and municipal assemblies are hereby authorized to appropriate funds for such purpose and to receive, manage and expend funds donated for such purpose and to make all contracts and purchases, including the acquiring of real estate, necessary in the premises. It shall be the duty of the county courts of the several counties and of the municipal assemblies of said cities, under the supervision and with the assistance of the adjutant general and in the form to be prescribed by him, to collect and file in such memorial building, or in the office of the county clerk of such county or other suitable place designated by the county court, or in such place as may be designated by the municipal assemblies of said cities, a record of the soldiers, sailors and marines who, as citizens of said county or city, served in the war against Germany and her allies and it shall be the duty of said county clerk and of the custodian designated by the municipal assembly of said city to safely keep and preserve such records properly indexed for ready reference thereto."

Section 15446, R. S. Mo. 1939, reads as follows:

"When the county court of any county or the mayor of said city shall certify to the governor that it has appropriated or raised the

sum of not less than two hundred and fifty dollars (\$250.00) for the purpose of carrying out the provisions of this article, a like sum, not to exceed the sum of one thousand dollars (\$1,000.00) shall be allotted said county or city for such purpose from the appropriation hereinafter made."

It will be noticed that Section 15444, supra, provides that a memorial to the citizen soldiery of Missouri in the "War against Germany and her allies," shall be erected in each of the counties of the state. Section 15445, supra, provides that the county courts of the several counties are authorized to erect such buildings or other memorials "and to do all things necessary to carry out the provisions of this article." Some of the actions necessary for this purpose are enumerated in Section 15445, supra. Among these are the appropriation of funds for such purposes and the selection of the nature of such memorial. These sections were passed in 1919 at the conclusion of World War I. We think the provisions of the statute authorize all necessary action on the part of the county court for the purpose of Article II, Chapter 138, R. S. Mo. 1939.

Section 23 of Article VI of the Constitution of 1945, reads as follows:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

Section 25 of Article VI of the Constitution of 1945, reads as follows:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may authorize any city of more than 100,000

October 18, 1945

inhabitants to provide for the pensioning of other employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

Whether an appropriation by the county court of public money for the purposes of a memorial building would be violative of these sections of the Constitution depends on whether such appropriation would be for a public or private purpose. (Jasper Co. Farm Bureau v. Jasper Co. (1926) 315 Mo. 560, l.c. 564.) There are no Missouri cases which directly decide this question, but it has been held in other states that such public memorials are for a public purpose.

In Slavich v. Hamilton (1927 Calif.) 257 Pac. 60, the county of Alameda proposed to erect a veteran's memorial building for the purpose of stimulating and promoting patriotism and provide meeting places and memorial halls for patriotic associations and their members. The court in that case, l.c. 63, said:

"* * *The building proposed to be erected according to the petitioners, will 'be used primarily as a meeting place and memorial hall for organizations whose membership is composed of soldiers, sailors and marines who have served the United States of America honorably in any of its wars.' While it is well settled that the erection of such a building is for public purposes (Allied Architects' Ass'n v. Payne, supra; Barrow v. Bradley, 190 Ky. 480, 227 S. W. 1016; Kingman v. Brockton, 153 Mass. 255, 26 N. E. 998, 11 L.R.A. 123; Hill v. Roberts 142 Tenn. 215, 217 S. W. 826),* * *"

In Hunter v. City of Louisville, 265 S. W. 277, 204 Ky. 562, the City of Louisville proposed to construct a memorial building to the soldiers and sailors of the last war and the court, l.c. 279, said:

* * *

"We therefore conclude that the expenditure of city funds in construction of the contemplated memorial is for a public purpose, although all of the soldiers and sailors in whose memory it is erected were not res-

October 18, 1945

idents of the City of Louisville. It follows that the act does not violate either of the constitutional provisions above mentioned."

In Barrow v. Bradley, 227 S. W. 1016, 190 Ky. 480, the same proposition arose and the court in that case, 1.c. 1017, said:

"(3) But it is so well settled now that the reasonable use of public money for memorial buildings, monuments, and other public ornaments, designed merely to inspire sentiments of patriotism or of respect for the memory of worthy individuals, is for a public purpose that it hardly seems necessary to devote time to a discussion of this branch of the case. Kingman v. Brockton, 183 Mass. 255, 26 N.E. 998, 11 L.R.A. 123 and note; 19 R. C. L. 722; Judson on Taxation, Sec. 349."

From the above we think it is clear that an appropriation for a memorial building is an appropriation for a public purpose and does not, therefore, violate the provisions of Sections 23 and 25 of Article VI of the Constitution of 1945.

CONCLUSION

It is, therefore, the opinion of this department that the county court of Marion county may contribute funds of the county in any manner they deem appropriate to aid in the construction of a memorial building in Marion County, subject only to the limitation that they must remain within the terms of Article II, of Chapter 138, R. S. Mo. 1939.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

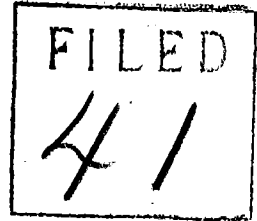
J. E. TAYLOR
Attorney General

SNC:mw

MISSOURI REAL ESTATE
COMMISSION:

- (1) Authority to issue separate types of licenses to the same person for the same licensing period;
- (2) Authority to promulgate rules relative to issuance of two separate licenses to same person for the same licensing period.

October 23, 1945



Missouri Real Estate Commission
222 Monroe Street
Jefferson City, Missouri

Attention: Mr. J. W. Hobbs, Secretary

Gentlemen:

Reference is made to your letter dated October 11, 1945, requesting an official opinion of this office, and reading, in part, as follows:

"Can a person who has been issued a real estate license as an officer of a Corporation and who desires to apply for an Individual Brokers License be issued the two separate types of licenses for the same year, also does the Missouri Real Estate Commission have the power to promulgate rules in which they can refuse more than one type of license during a calendar year."

With respect to the first question you have propounded, we direct your attention to a portion of Section 2 of an Act of the General Assembly, found in Laws of Missouri, 1941, page 424, reading as follows:

"A corporation, copartnership or association shall be granted a license when individual licenses have been issued to every member or officer of such copartnership, association or corporation who actively participates in its brokerage business,
* * * "

October 23, 1945

Further, your attention is directed to Section 7 of the same Act, which reads as follows:

"A license shall be granted only to persons who bear, and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business of a real estate broker or a real estate salesman in such manner as to safeguard the interests of persons whom they represent."

From an examination of the above quoted portions of the Act, it becomes apparent that the licensing regulations applicable to persons desiring to engage in business, either individually or as officers or members of a corporation, copartnership or association, are identical. Further examination of the entire Act discloses no prohibitions against the issuance of licenses for the same licensing period to an individual both as an officer of a corporation, copartnership or association and as an individual. Such being the case, we believe that no prohibition in fact exists and that the same person may lawfully hold both types of license for the same licensing period.

With respect to the second question you have propounded, we direct your attention to a portion of Section 4 of the Act of the General Assembly, found in Laws of Missouri, 1941, page 424, reading as follows:

" * * * Said commission may do all things necessary and convenient for carrying into effect the provisions of this act, and may from time to time promulgate necessary rules and regulations compatible with the provisions of this act. * * * "

Under the express authorization contained in the quoted portion of the Act, the Missouri Real Estate Commission does have authority to promulgate necessary rules and regulations for the enforcement of the provisions of the entire scheme of licensing real estate brokers and salesmen in the State of Missouri.

However, certain restrictions apply to the right of any governmental commission, board or agency respecting the discharge of its official duties. We direct your attention in that regard to the following quotation from "States," 59 C.J., page 112:

"Powers granted to state administrative agencies must be exercised in a just and reasonable manner and in conformity with the statutory or constitutional source of the power conferred."

Considering the proposed rule which would prohibit the issuance of separate licenses to a person both as an officer of a corporation, copartnership or association and as an individual, covering the same licensing period, in the light of the above principle, we reach the conclusion that such proposed rule and regulation would be unjust and unreasonable. We are persuaded to this view by reason of the fact that the licensing requirements are identical both for an individual and for an officer of a corporation, copartnership or association, and by further reason of the fact that no prohibition exists in the act itself against the issuance of such separate licenses.

CONCLUSION

In the premises, we are of the opinion that a person may be licensed by the Missouri Real Estate Commission for the same licensing period both as an individual real estate broker or salesman and as a member or officer of a corporation, copartnership or association.

We are further of the opinion that any rule or regulation of the Missouri Real Estate Commission which would prohibit the same person being licensed both as an individual real estate broker or salesman and as an officer or member of a corporation, copartnership or association for the same licensing period would be unjust and unreasonable, and unauthorized by the Act creating the Missouri Real Estate Commission

October 23, 1945

and delegating to it authority to promulgate such rules as may be necessary for the carrying out of the provisions of the Act found in Laws of Missouri, 1941, page 424.

Respectfully submitted,

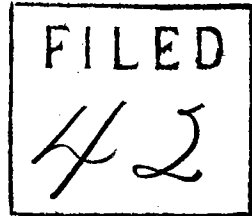
WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

BUILDING AND LOAN: Notice for annual or semiannual
meetings.
NOTICE:



June 27, 1945

Mr. F. M. Horton, Supervisor
Bureau of Building and Loan Supervision
State of Missouri
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of June 12, requesting an official opinion from this department, which reads:

"Considerable confusion and uncertainty exist among building and loan associations of Missouri as to the proper method of publishing notices of their annual meetings. Will you please furnish this office with an opinion as to what notice should be given of annual or special meetings of the shareholders of building and loan associations, and how such notice should be published."

Section 8202, R. S. Mo. 1939, which is a part of the Act pertaining to building and loan associations, concludes as follows:

" * * * * shall become a corporation on complying with the provisions of this article, and shall remain a corporation, with all the powers and privileges, and subject to all the duties, limitations and restrictions, conferred by general laws upon corporations, except as herein-after otherwise provided."

Section 8207, R. S. Mo. 1939, provides that the bylaws of building and loan associations must be approved by share-

June 27, 1945

holders and the same shall not be inconsistent with the Constitution or laws of the state. Furthermore, such bylaws must be approved by the supervisor of building and loan associations. Said section reads in part as follows:

"The shareholders of such corporation may make and adopt all necessary by-laws for the government of the affairs and business of the corporation, provided that the same shall not be inconsistent with the Constitution or laws of the state. A copy of such by-laws shall be filed with the supervisor of building and loan associations, and such by-laws, and any amendments thereto or changes therein, shall not be in force and effect, and no action shall be taken thereunder until the same are approved by the supervisor of building and loan associations as being practically and financially sound and in the best interest of the shareholders: * * * * *"

Section 8208, R. S. Mo. 1939, specifically provides that the time of each periodical meeting of officers and shareholders of building and loan associations shall be provided for in the bylaws. Said section provides as follows:

"The number, title and functions of the officers of any corporation created by virtue of this or any previous law, their terms of office, the time of their election, as well as the qualification of electors, and the time of each periodical meeting of the officers and shareholders of such corporation, shall be provided for in the by-laws. * * * * *"

Section 8212, R. S. Mo. 1939, at least indicated that building and loan associations should provide in their bylaws for the giving of notice for the holding of annual meetings, however this section was repealed by the 62nd General Assembly, Laws of 1933, page 335.

Chapter 40, R. S. Mo. 1939, pertains to the creation and administration of the bureau of building and loan supervision

June 27, 1945

and building and loan associations. In said chapter there are statutory provisions requiring notices for various purposes, however we are unable to find where there is any provision specifying any particular kind of a notice shall be given for an annual or semiannual meeting, other than as herein above stated in Section 8208, supra.

In view of Section 8202, supra, providing that building and loan associations shall be subject to all the duties, limitations and restrictions conferred by general laws upon corporations, except as hereinafter otherwise provided, will require an examination of the Corporation Laws of the State of Missouri to determine if there is any provision applicable to building and loan associations. The Corporation Laws of the State of Missouri, for most purposes, was repealed by the 62nd General Assembly, and a new law enacted (Laws 1943, pages 410 to 491). Section 3 of said Act provides that corporations for profit, except building and loan associations and other corporations enumerated therein, may be organized under the Act for any lawful purpose or purposes. Said section reads:

"Corporations for profit except banking, insurance, railroad corporations, building and loan associations, saving banks and safe deposit companies, credit unions, mortgage loan companies, union stations, trust companies, and exposition companies may be organized under this Act for any lawful purpose or purposes."

Section 171 of the same Act, subsection (b), further provides that no provision of said Act, other than those mentioned in subsection (a), shall be applicable to building and loan associations and other enumerated corporations, and in no manner refers to notices. Section 171, subsections (a) and (b), read:

"The provisions of this Act shall be applicable to existing corporations as follows:

"(a) Those provisions of this Act requiring reports, registration statements, anti-trust affidavits, and the payment of taxes and fees, shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign, which were required to make such reports, registration statements and anti-trust affidavits, and to

June 27, 1945

pay such taxes and fees, prior to the enactment of this Act.

"(b) No provisions of this Act, other than those mentioned in sub-paragraph (a), shall be applicable to banks, trust companies, insurance companies, building and loan associations, savings bank and safe deposit companies, mortgage loan companies, and non-profit corporations."

Section 27 of the same Act, page 429, merely provides that notices of annual meetings shall be in the bylaws of said corporation, however it does not in any manner specify how said notices shall be given. No part of the Corporation Act of 1943 relates to building and loan associations giving notice of a semiannual or annual meeting.

A well established rule of statutory construction is that different sections of statutes bearing upon the same subject must be harmonized, if at all possible. In *State vs. Freeland*, 300 S.W. 675, 1.c. 677, the court said:

"When different sections of the statutes bear on a subject it is a rule of construction that such sections must be harmonized if possible.
* * * * *

After careful research we are unable to find any law making it mandatory upon building and loan associations to call a semiannual or annual meeting since the repeal of Section 8112, R. S. 1939, and since the Corporation Law of 1943 does not apply to building and loan associations, at least in so far as to giving of notice of meetings is concerned. We sincerely doubt if there is any authority for demanding such semiannual or annual meetings, however if building and loan associations do have, or anticipate having, such meetings, in view of Section 8208, *supra*, the bylaws of said associations should specify the time and place of each meeting of officers and shareholders, and since there is no law specifying how this shall be done, we are of the opinion that the bylaws should require a reasonable notice to be given of said meetings.

The courts have construed "reasonable notice" in many different ways, dependent upon the facts in the case. In

June 27, 1945

Maryland Casualty Co. vs. Dobbin, 108 S. W. (2d) 166, 1.c. 173-174, the court construed "reasonable time" in which to present a check for payment to be the following day when the check is delivered to payee at the same place where the bank on which it is drawn is located. In so holding the court said:

"In determining what is a reasonable or an unreasonable time in which to present a negotiable instrument, regard is to be had to the nature of the instrument and the usage of trade and business, if any, with respect to such instrument and the facts of the particular case.

"The rule seems to be well established in Missouri that, where a check is delivered by the drawer to the payee in the same place where the bank on which it is drawn is located, a reasonable time for its presentment, where no cause for delay appears, is within the banking hours on the day of its delivery or within the banking hours on the next day after its delivery. (Cases cited)"

In Trustees of Belfast Academy vs. Salmond, 11 Mo. (Fairf.), 109-114, the court held that, where a majority of the trustees resided in the town, a notice of seven days to the owners of land, under which they were able to lay out a town-way, was reasonable.

In Johnson vs. Michigan Milk Marketing Board, 295 N. W. 346, 1.c. 350, the Michigan Supreme Court said:

"Question is raised as to lack of notice of hearings. Section 19 requires publication in a newspaper or newspapers in general circulation through the marketing area at least a week before the date set for hearing, and this is sufficient notice."

In Sundheim Building and Loan Associations, Third Edition, Chapter 7, Section 88, page 88, we find the following rule as to requirements of building and loan associations for giving notice:

June 27, 1945

"When the by-laws fix the time and place of holding regular meetings of the stockholders, or of the board of directors, no notice thereof need be given; or if the time is fixed and the meeting is to be held at the usual meeting place none need be given; but if a meeting is held at another than the usual time or place, notice must be given. The by-laws should direct the board to hold regular meetings at such time and place as they may fix by special or standing order. Then when this order is made no notice of a directors' meeting need be given. Of course, it is usual, despite the by-laws, to give notice of all meetings, the only purpose in doing away with the necessity of notice being to prevent the necessity of actual notice, for it has been held that when the time of meeting has not been fixed by charter, by-laws or other competent authority, actual notice of every meeting is indispensable to make it legal for the transaction of even ordinary business. The by-laws should prescribe the method of giving notice of special meetings. In the absence of a by-law or custom to the contrary at least one full day's notice of a special meeting of the board of directors must be given, and where a definite and important transaction is contemplated at a special meeting of the contemplated action. A stockholder present at a meeting and voting without objection cannot contend that the meeting was irregularly called."

By way of illustration only, we refer you to the general statute relative to notice for corporations (Section 28, page 429, Laws 1943), which, as hereinabove stated, is not applicable to building and loan associations, but which requires among other things that notice of meetings shall be delivered or given not less than ten days, or more than thirty days, before the date of the meeting.

Therefore, it is the opinion of this department that, in the absence of any statutory provision relative to notice that shall be given for annual and semiannual meetings, if building and loan associations do have such meetings they should provide

June 27, 1945

in their bylaws for the time and manner of giving notice of said meetings, and this may be done by mailing notices to all the officers and shareholders of the association or giving notice by publication in some newspaper of general circulation in the city or county wherein the principal office of said association is located. In either case said notice to comply with the foregoing definitions as to reasonable notice should be given at least several days prior to the scheduled meeting.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARM:ml

- ELECTIONS: (1) Envelopes used to carry out the provision of the official war ballot law may be amended for use in a special election;
- (2) Ballot used for civilian absentee voting in special election may be used as ballots for soldier voting.

January 16, 1945

Hon. George J. Hug, Chief Clerk
Board of Election Commissioners
For the City of St. Louis
208 South Twelfth Boulevard
St. Louis, Missouri



Gentlemen:

This will acknowledge receipt of your letter, in which you request an opinion of this Department upon the following questions:

"Enclosed find one set of 'mail out' and 'return' envelopes used at the November 7, 1944, General Election. As we have quite a supply of these envelopes on hand, we would like to use them for the February 27, 1945, Special Election.

"The Board has directed me to ask you for an opinion as to the use of the envelopes for the Special Election as originally printed or as corrected by this office or corrected as you may suggest.

"The Board further requests an opinion from you as to the printing of the ballots for soldier voting. Would it be necessary to have the ballots captioned 'Official War Ballot,' with instructions for voting printed on the back, or could we use the same ballots for soldier voting and civilian absentee voting?"

The Constitutional Convention of 1943-1944 passed an ordinance entitled "Manner of Holding Election, submitting the proposed Constitution of Missouri to the electors and fixing the date of said election," as appears by the Journal of said Convention for September 29, 1944. The provisions of said ordinance read as follows:

"* * * a special election to be held for that purpose on Tuesday, February 27, 1945. Every person entitled to vote under the Constitution and Laws of this state shall be entitled to vote at said election. Said election shall be held and said qualified electors shall vote at the usual places of voting at general elections in the several counties of this state including the city of St. Louis; and, except as herein otherwise provided, said election shall be conducted and returns thereof made according to the laws in force on said date regulating general elections; provided, that it shall not be necessary to hold said election with booths for the voters, and that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two Parties which cast the highest and next highest number of votes for Governor at the last general election. In cities and counties where registration of voters is now provided for by law said special election shall be held in accordance with the provisions of law now in effect applicable to the holding of general elections in said cities and counties, except that only one judge and one clerk shall be selected from each of the majority Parties as above provided. * * *

The Missouri War Ballot Law, passed in Extraordinary Session, 1944, page 28, Sec. 1, provides who may vote absentee ballot:

"Any person being a duly qualified elector of the State of Missouri who is absent, or who expects to be absent, from the State or from the county in which he is a qualified elector, on military or naval service and who may, on the day of holding of a special, primary or general election * * *

or at which any question of public policy is submitted, be absent from his voting precinct because of duties requiring him to be absent from the State or from the county in which he is a qualified elector, on the day of such election, may vote an absentee ballot as hereinafter provided."

Sec. 2 of said Act, provides:

"For the purpose of making application for an absentee war ballot to be voted in a * * * special election by such absent voter as mentioned in this Act, the application by post card, which is provided for under the 'War Ballot Act' of the 77th Congress, Public Law 712, H. R. 7416, or any written request, telegram, cablegram or radiogram wherein are stated his name, voting address and the address to which the ballot desired by him is to be sent, shall be received and taken by the Clerk of the County Court or Board of Election Commissioners as an application to vote the absentee ballot provided for under this Act. * * * * *

Any application received by the Secretary of State shall be deemed to be an application to the county clerks or boards of election commissioners of the various counties or election districts where the elector has his place of residence; and the Secretary of State, immediately upon receipt of such applications, shall send the same by first class mail to such county clerks or boards of election commissioners, who shall handle such applications as made to the Secretary of State in the same manner as though such applications had been made to such clerks or boards."

Sec. 3 of said Act, provides:

"* * * The maximum size and weight of the ballot for all elections for all parties shall be prescribed by the Secretary of State. The form and contents of such ballot shall comply with the primary and general election laws as they now or hereafter may exist, except as to the instructions required to be placed on primary and general election ballots, and except that the ballot for primary elections for all parties shall consist of a single sheet of paper * * *

" * * * * *

" * * * It shall be the duty of such election officials to cause to be printed a sufficient number of 'official war ballots' and 'propositions' which may be submitted at such election to meet the requirements of the absent voters described in this Act who may be qualified to vote in the respective county or election district as the case may be."

Sec. 5 of said Act, provides:

"The clerks of the county courts and the boards of election commissioners in cities or counties where such boards conduct elections shall cause to be prepared and printed an appropriate number of official envelopes for use in connection with official war ballots, each such envelope shall be gummed ready for sealing. Such envelopes shall be of two types and sizes. They shall be used for the following purposes and shall comply substantially with the form hereinafter set out.

"One envelope shall be sufficiently large to contain the second or smaller envelope after the official war ballot has been inserted into the smaller envelope. The larger envel-

Jan. 16, 1945

ope shall be used for transmitting the smaller envelope and ballot to the absentee elector and shall have printed on the front thereof substantially the following: * * * * *

The ordinance setting forth the manner of election has prescribed that the general election laws be followed for the special election except that voting booths are not required and a smaller number of judges and clerks are required. The provisions relative to the war ballot law should be liberally construed so as to effect the greatest exercise of franchise by members of the armed forces, and the duty and desire of all election officials are to make this exercise of franchise as available as possible. Although Sections 3 and 5 of the War Ballot Act do not clearly set out the requirements for a ballot or envelope to be used in a special election in connection with the war ballot law, there is nothing in the envelope as corrected by you that would interfere with the exercise of franchise in this special election.

The official ballot to be used in the special election, Tuesday, February 27, 1945, is small, concise and self-explanatory, and does not require additional instructions, but it should be labeled, "Official War Ballot for Special Election, Tuesday, February 27, 1945."

CONCLUSION

It is, therefore, the opinion of this Department that (1) the Board of Election Commissioners of the City of St. Louis can properly use the war ballot envelopes as corrected; that (2) the Board of Election Commissioners of the City of St. Louis should label the ballots sent out under the war ballot law, "Official War Ballot for Special Election, Tuesday, February 27, 1945."

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

AVO:CP

COUNTY TREASURER:
DRAINAGE AND LEVEE DISTRICT:
FEES:

Fee and compensation allowed
treasurer() levee district
organized by county court.

January 23, 1945

FILED

43

1/27

Honorable H. B. Hunt
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Sir:

This will acknowledge receipt of your request for
an opinion under date of December 28, 1944, which reads:

"We have in Atchison county a levee
district incorporated by our County
Court which has long been in existence,
and is known as Levee District No. 1
of Atchison county.

"The County Treasurer of this county, as
Treasurer of said Levee District No. 1, has,
for many years, received one per cent of
sums paid out under the authority of what
is now Section 12471, R. S. Mo. 1939, as
his compensation for acting as such treasurer.

"A question has arisen as to whether the said
treasurer's compensation for handling said
district's funds should be paid according
to the section above cited, or according to
Section 12559, R. S. Mo. 1939, which provides
for compensation of one-half of one per cent
of all levee funds disbursed by said
treasurer, the same to be paid out of the
levee funds."

The writer is unable to find any cases reported
specifically construing these two statutory provisions, or
as far as that matter is concerned, construing either of the
two provisions.

There are two well established rules of statutory construction. First, that the primary rule of construction of statutes is to ascertain and give effect to lawmakers intent and this should be done from words used, if possible, considering the language honestly and faithfully. See *City of St. Louis vs. Senter Commission Co.*, 85 S. W. (2d) 21, 337 Mo. 238. The second rule is that statutes relating to the same subject matter must be construed together and, if possible, give effect to each provision. In *Little River Drainage District vs. Lassiter*, 29 S. W. (2d) 716, 1.c. 718; 325 Mo. 493, the Court said:

"It is the duty of courts in construing two or more statutes relating to the same subject, to read them together and to harmonize them, if possible, and to give force and effect to each." **

The two statutory provisions necessary to consider in rendering this opinion are Sections 12471, R. S. Mo., 1939, and Section 12559, R. S. Mo., 1939. The former provision was enacted in 1913 and is found on page 321, Laws of Missouri, 1913, and in Revised Statutes of Missouri, 1919, known as Section 4576. The latter provision was originally adopted in 1889 and may be found in the Revised Statutes of Missouri, 1889, as Section 6677. Sections 12471 and 12559, R. S. Mo. 1939, are quoted:

"County treasurers for receiving, receipting for, preserving and paying out funds of drainage and levee districts, shall receive one per cent of sums paid out." Sec. 12471, R. S. Mo. 1939.

"The county treasurer of the county in which the greater part of any organized levee district lies shall be the treasurer of the levee fund of the district, until paid out, upon the warrants issued by order of the board of directors of the levee district. Before receiving any funds belonging to the levee district, the treasurer shall give a separate bond, with sufficient security, in double the probable amount of the levee fund that shall come into his hands, payable to the state of Missouri, to be approved by the board of directors, conditioned for the faithful disbursement, according to law, of all such moneys as shall, from time to time, come into his hands to the credit of the levee fund of the levee district of which the county of

which he is treasurer is part; and such bond shall be filed in the office of the clerk of the county court of the county in which said treasurer is appointed or elected. On the forfeiture of such bond, it shall be the duty of the clerk of the county court in whose office said bond is filed to collect the same for the use of the levee district. If such clerk shall neglect or refuse to prosecute, any freeholder of the district may cause prosecution to be instituted. It shall be the duty of the board of directors in no case to permit the county treasurer having the custody of the levee funds of the district to have in his possession at any one time an amount of levee funds over one-half the amount of the security available in the bond. Such treasurer shall be allowed such compensation for his services as the board of directors deem advisable, not to exceed one-half of one per cent of all levee funds disbursed by him, and to be paid out of the levee funds." Sec. 12559, R. S. Mo. 1939.

The significant thing to the writer is that neither of these two provisions have ever been amended in any manner. They are today in their original state; therefore, we cannot benefit much by reviewing the history of these two statutes.

Section 12468, R. S. Mo. 1939, specifically takes services rendered by certain county and township officers in organization of drainage and levee districts out of the regular fee statute and provides that they shall be entitled to receive reasonable compensation as fixed by the courts for services actually rendered, except as is otherwise provided in subsequent sections of the same article.

"Sec. 12468. That it is understood that the ordinary fee statute does not apply to services rendered by any county or township officer or witness in the organization, incorporation, or administration of any drainage or levee districts heretofore organized, in process of organization at the time of passage of this article, or that hereafter may be organized under any general or special law of Missouri permitting the organization of drainage or levee districts, but that such officer or witness, except as is

otherwise provided for in the subsequent sections of this article, shall receive only a reasonable compensation to be fixed by the courts for services actually rendered, that petitioners for formation or incorporation of drainage and levee districts and the officers of such districts after the same have been organized may prepare, write or print all copies of petitions, writs, orders and decrees of courts and other papers pertaining to such districts and furnish the same to the county and circuit clerks or other officers for their use, and in such event such officer shall be entitled to only a reasonable compensation for services actually rendered the districts in issuing such writs and copies of decrees, orders or other papers."

Then following Section 12468, supra, and in the same article will be found Section 12471, supra, which takes precedence over the provisions of Section 12468, supra, and which specifically allows the treasurer a fee amounting to one per cent of all sums paid out.

Section 12559, supra, is found in the article pertaining to levee districts organized by county courts which includes the levee district mentioned herein. This provision provides that the county treasurer shall be treasurer of the levee fund of the district and shall be allowed such compensation for his services as the board of directors deem advisable; however, not to exceed one-half of one per cent of all levee funds disbursed by him and to be paid out of said levee funds.

It was held in Little River Drainage District vs. Lassater, 29 S. W. (2d) 716, l. c. 719, that the duty of the County Collector in collecting drainage and levee taxes is in no way a part of his official duty as the County Collector, but are additional duties.

While, as hereinabove stated, the statutes in question have never been construed as to the fee to be paid the County Treasurer for services rendered, we do find in Little River Drainage District vs. Lassater, supra, wherein the court construed statutes similar to those in question which referred to fees allowed the county collector for services rendered instead of the county treasurer. In that case, the court held that Section 3, page 322, Laws of Missouri, 1913, provided a fee

January 23, 1945

for the collector and that said fee was applicable to county and circuit court drainage and levee districts alike and did not apply to any single district. The court in that case harmonized the provisions of Section 3, Laws of Missouri, 1913, supra, with similar provisions allowing fees for services rendered for organizing and administering various kinds of drainage and levee districts. The court in so holding said:

"Laws of 1913, p. 321, of which present section 4575 was section 3, was an enactment on a new subject. Other laws passed in 1913 affecting drainage and levee districts dealt with districts organized by circuit courts, and made no general revision of the law relating to drainage and levee districts organized by county courts. There is nothing to indicate that section 3, Laws of 1913, p. 321, was intended to apply to drainage and levee districts organized by county courts and not to apply to circuit court drainage and levee districts. At least it would seem reasonable to suppose, in view of all the circumstances of the revision of 1913, that the General Assembly would have said so explicitly if it intended that what is now section 4575 should apply only to drainage and levee districts organized by county courts.

"In Laws of 1913, p. 321, the General Assembly apparently undertook to enact new legislation concerning fees in the organization and conduct of drainage and levee districts. It sought to authorize county collectors and township collectors in all such districts to receive more than 1 per cent for collecting taxes of such districts under certain circumstances. It would have taken four separate amendments to express such legislative intention in each of the four articles relating to circuit court and county court drainage districts and to circuit court and county court levee districts. It apparently undertook to do it in one general act applicable alike to all such districts."

In view of the decisions rendered in the foregoing case, holding that Section 3, Laws of Missouri, 1913, supra, relative to collectors' fee, applied to all drainage and levee districts, organized both in county and circuit courts, apparently the same is true of Section 4 immediately following

Section 3 and in the same Act which provides for a fee for county treasurer. It likewise applies to drainage and river districts organized in both county and circuit courts. Section 4 was the original enactment of what is now known as Section 12471, R. S. Mo. 1939.

It is impossible to harmonize the provisions of Section 12471, supra, and Section 12559, supra. These two provisions are in direct conflict. Therefore, we must follow another well known rule of statutory construction which was laid down in *State vs. Richman*, 148 S. W. (2d) 796, 1. c. 799, holding that where statutes are in conflict and they cannot be harmonized and where one statute is considered a general act and the other a special act, where the general act is the later enactment, the special act will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication. In so holding, the court said:

"In *State v. Harris*, 337 Mo. 1052, 1058, 87 S. W. (2d) 1026, 1029, we said that if statutes are necessarily inconsistent that which deals with the common subject matter in a minute and particular way will prevail over one of a more general nature; and, citing authorities, we quoted the rule as stated in *State ex rel. County of Buchanan v. Fulks*, 296 Mo. 614, 626, 247 S. W. 129, 132, thus: "Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication. '"

Therefore, following the above rule of statutory construction, Section 12471, supra, being a general act applicable to all drainage and levee districts, and also being the later enactment of the two provisions, we are

Hon. H. B. Hunt

-7-

January 23, 1945

construing herein, and Section 12559, supra, being a special act enacted long prior to that of Section 12471, supra, it is the opinion of this department that the special act, Section 12559, supra, is controlling as to the amount of fee to be allowed the county treasurer in levee districts organized by the county court as in this instance, and the fee paid the county treasurer for services rendered should be in accordance with said section.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

Harry H. Kay
(Acting) Attorney-General

ARH:mr

INTERMEDIATE REFORMATORY

Final:

The court cannot lawfully assess concurrent sentences for burglary and larceny where a person is charged both offenses in same count.

April 4, 1945

FILED

43

4/19

Honorable V. Don Hudson
Superintendent
Intermediate Reformatory for Young Men
Jefferson City, Missouri

Dear Mr. Hudson:

Under date of March 27th you wrote the Attorney General requesting advice upon the following questions:

"Re: James H. Smith, Our #5322

"The above named subject was tried and convicted on charges of Burglary and Larceny in the Circuit Court of Monroe County February 2, 1945, sentenced to this institution, and received sentences of Three Years on each charge to run concurrently. On March 18, 1945 he escaped and was returned to this institution the same day. I am interested in knowing whether or not the transferring of this subject to the Penitentiary would necessitate his serving these sentences consecutively. I suggest that you see State vs. Huff, 181 S. W. (2d) Vol. 3, p. 513.

"I am also interested in knowing whether or not a boy sent to Algoa under sentences of Burglary and Larceny is compelled to serve his sentences consecutively when neither of the words are used in stating the sentences on the Commitment paper."

April 4, 1945

The law establishing the Intermediate Reformatory is found in Article 6, Chapter 48, R. S. Mo. 1939. Section 9117 of this article provides what persons shall be sentenced to the institution, as follows:

"If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term prescribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials in charge of said reformatory to receive all such convicted persons."

The sections of the penal code fixing the limits of punishment for offenses generally, refer to imprisonment in the penitentiary, as, when the majority of these sections were enacted, no Intermediate Reformatory existed. For that reason, when a court assesses a punishment of imprisonment in the Intermediate Reformatory, it necessarily has to be within the limits fixed for imprisonment in the penitentiary. This situation in the law creates some particularly difficult problems. For example, in the case of Anthony v. Kaiser, 350 Mo. 748, the Supreme Court held that the portion of Section 9226, R. S. Mo. 1939, relating to punishment of convicts for offenses committed while under sentence to the penitentiary, did not apply to convicts who had been originally sentenced to the Intermediate Reformatory.

In your letter you state that the person received concurrent sentences of three years each to the Intermediate Reformatory, escaped, was captured, and now is subject to be transferred to the penitentiary. Section 9118, R. S. Mo. 1939.

You further call attention to the case of State v. Huff, 181 S. W. (2d) 513. In this case the Supreme Court had

April 4, 1945

before it the question of construing and applying Section 4849, R. S. Mo. 1939, to the case of a person who had been convicted of burglary and larceny charged together in one count of the indictment or information (this method of prosecution for burglary and larceny is authorized by statute, Section 4448, R. S. Mo. 1939).

The Supreme Court held that under the situation existing in that case the trial court had no authority to assess concurrent sentences and corrected the error by correcting the sentences so that they would be cumulative.

Your letter does not state whether the person mentioned as receiving concurrent sentences for burglary and larceny had been charged in one count or in one information or indictment containing two counts for both offenses. But it is assumed that he was so charged and tried, for persons are generally charged in that manner for these two offenses. However, if the person was not so charged, then what is said herein would not be applicable.

In the case of Anthony v. Kaiser, supra, while discussing sentences to the Intermediate Reformatory and to the Penitentiary, the court pointed out that after the transfer the sentence should in legal contemplation be treated as if it had originally been to the Penitentiary.

Under the facts stated in your letter, the situation as it now stands is that the person has been given concurrent sentences to the Intermediate Reformatory for burglary and larceny, and it is extremely doubtful if the court had the power to do this, for the court could not have lawfully sentenced the person to concurrent sentences in the Penitentiary for two offenses. Now, if he is transferred to the Penitentiary, it would be the same as if he had originally been sentenced to the Penitentiary.

Warden Whitecotton is familiar with the Huff case heretofore mentioned, as about a week ago this office, at his request, furnished him with a copy. In all probability, if a person were transferred to the Penitentiary, the Warden, being familiar with the Huff case and knowing that concurrent sentences cannot be lawfully imposed for these two offenses, upon the transfer would cause the Penitentiary records to carry

April 4, 1945

the sentences as cumulative. If this occurred, at the end of the two-year period the person could bring a habeas corpus proceeding and see what the Supreme Court would do about it.

In regard to your second question, sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehension by those who must execute them. *Anthony v. Kaiser*, 350 Mo. 748; *United States v. Daugherty*, 70 L. Ed. 309; see also annotations 70 A. L. R. at page 1521. Also, the general rule is that in the absence of an applicable statute making terms successive, or a direction to that effect, in the sentence or commitment, terms imposed by the same court to the same institution are to be regarded as concurrent. *McCracken v. Kaiser*, 179 S. W. (2d) 470; *State ex rel. Meininger v. Breuer*, 304 Mo. 381. The Supreme Court has said that when a person is charged with burglary and larceny in one count and convicted of both before sentence is pronounced for either offense the person cannot legally be given concurrent sentences.

The Superintendent of the Intermediate Reformatory is presumed to know the law and where the record in a case of this nature is silent as to whether the sentences are to be concurrent or consecutive, the Superintendent should apply the statute as he knows it to exist and as the courts have held it to apply, and enter the sentences as cumulative.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

WOJ:EG

APPROVED:

J. E. TAYLOR
Attorney General

MAGISTRATE COURTS : Magistrate Courts law under New Con-
: stitution will not become effective
JUSTICES OF THE PEACE : until July 1, 1946, unless sooner
implemented by legislation.

April 6, 1945

FILED

428 44

Honorable David E. Impey
Prosecuting Attorney
Texas County
Houston, Missouri

Dear Mr. Impey:

This will acknowledge receipt of your letter
of March 31, relative to the following:

"I should like your opinion upon
the questions:

"(1). Is there now a Magistrate
Court of Texas County?

"(2). In the event a Justice of
the Peace dies or resigns (If the
Probate Judge of this County is now
vested with the powers of Judge of
the Magistrate Court or after we do
have a Magistrate Court if there is
not one now in this County), does
the office of Justice vacated by such
death or resignation cease to exist,
and is the County Court without power
to appoint one to fill out the unex-
pired term?"

Section 21 of Article V of the New Constitution
provides as follows:

"The general assembly shall provide
for the administration of magistrate
courts consistent with this Consti-
tution."

Texas County having a population of less than
30,000 persons, the Probate Judge would become the Judge
of the Magistrate Court when provided for by the Legis-
lature. In our opinion, the office of Justice of the Peace

April 6, 1945

in your county will continue until legislation on the Magistrate Court is passed by the Legislature. The applicable sections of the New Constitution are as follows:

Section 2 of the Schedule of the New Constitution provides:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Section 4 of the Schedule of the New Constitution provides:

"All courts of common pleas now existing, the St. Louis courts of criminal correction, and all circuit court circuits as now established, shall continue until changed or abolished by law. The justices of the peace shall continue to hold their offices and receive the emoluments thereof until their terms of office expire, upon which their records shall be transferred to the magistrate courts."

CONCLUSION.

It is, therefore, the opinion of this Department that notwithstanding the effective date of the New Constitution being March 30, 1945, that:

- 1) There is now no Magistrate Court in Texas County, as Magistrate Courts must first be provided for in the counties by the Legislature, and,
- 2) Under the provisions of Section 4 of the Schedule of the New Constitution, the Justices of the Peace who were in office on March 30, 1945, will continue in office until the end of their terms. If a vacancy should occur in said offices prior to July 1, 1946, the same could be filled under the provisions of Section 2527, R.S. Mo. 1939. On July 1, 1946, the office of the Justice of the Peace will automatically

Honorable David E. Impey

-3-

April 6, 1945

cease except as to those Justices who were in office on March 30, 1945, and if a vacancy should occur in any of the latter offices after July 1, 1946, same could not be filled.

Respectfully submitted,

R. WILSON BARROW
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

RWB ;ir

2 P Smith

SHERIFF'S FEES: Sheriff is not entitled to his fee for services rendered until the litigation is ended.

October 22, 1945

FILED

44

11/9

Honorable David E. Impey
Prosecuting Attorney
Texas County
Houston, Missouri

Re: Sheriff's fees in Sanity
Cases before County Court

Dear Sir:

The Attorney General acknowledges receipt of your letter of recent date requesting the opinion of this department. Your letter reads as follows:

"I will appreciate your opinion as to whether or not the Sheriff is entitled to payment by the County for his fees and mileage in executing an order for the apprehension of an alleged insane person and service of notice of hearing and subpoenas issued by the County Clerk where the alleged insane person was taken into custody by the Sheriff and by him released to members of her family at the direction or suggestion of the presiding judge of the County Court and on the date of hearing they reported that she had fled and could not be produced. It might be stated that Texas County has no proper place for the detention of women prisoners charged with crime or insanity and the procedure of releasing this woman to the custody of her brothers was actuated by these conditions."

According to your correspondence there has never been an adjudication with regard to the person alleged to be

insane. It is a well established rule that before an officer is entitled to compensation, he must be able to put his finger on the statute authorizing such compensation. A statement of this rule is found in *Wodaway County v. Kidder*, 129 S. W. (2d) 857, 1. c. 860:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Charlton County, 85 Mo. 645."

The same rule is found in State ex rel. Troll v. Brown, 146 Mo. 401, 1. c. 406.

Section 13411, R. S. Mo. 1939, sets out the fees to which a sheriff is entitled.

At common law each party was required to pay for services rendered at the time such services, as the sheriff has performed here, were performed. By statute in this state, security for such costs is required to protect the fees of officers of the court. Sections 1401-1402, R. S. Mo. 1939.

In State ex rel. Dale v. Ashbrook, 40 Mo. App. 64, 1. c. 66-67, in holding costs are not paid step by step as demands are made for services on the officer, but accumulate until the litigation is at an end, the court said:

"The contention of the defendants on this appeal is that, after the party, in whose favor a judgment is rendered, acknowledges satisfaction of it, it cannot be the foundation of an execution, even for the costs which are due the officers of the court. We do not take this view. At common law litigation was not conducted on the credit system, as with us, but the plaintiff purchased his writ, and each party paid his costs step by step as the services

were procured and as the cause proceeded. At the end of the litigation the successful party recovered his costs--that is, the costs which he had paid out. The idea of requiring the plaintiff to give security for costs seems to have been to indemnify the defendant against the costs to which he might be put by the litigation, in case it should turn out to be unfounded. Accordingly, the language of such a rule frequently was that the plaintiff be required to give security for the defendant's costs. Roberts v. Roberts, 6 Dowl. 556; Anon., 1 Wils. 130.

"But with us the costs are not ordinarily paid step by step, as each party demands of the proper officer of the court the rendition of some particular service; but they generally accumulate until the litigation is finally ended, and then they are recovered nominally by the successful party, but really by the officer of the court to whom they are due. Trail v. Somerville, 22 Mo. App. 308, 312. We still keep up the ancient form, so far that, according to the judgment entry, the costs are recovered by the successful party, and the execution runs in the same way, so as to conform to the judgment; but they are never, in fact, collected by him, nor paid over to him. According to a usage which, it is believed, has existed from the foundation of our judicial system, the name of the successful party is thus used in the judgment and execution as the person in whose behalf the costs are recovered and collected, but the real beneficiaries are the officers of the court to whom they are due. This usage has acquired the force of law. The officers of the court and the witnesses are so entirely the real beneficiaries that they can maintain an action in their own names for the breach of an undertaking given for the security of costs in a litigation. Garrett v. Cramer, 14 Mo. App. 401.

The party in whose name the costs are recovered is, in respect of them, at most, a trustee of a dry trust--so dry that he is not allowed to handle any of the trust fund. His name in the judgment and execution is a mere naked name of record. The use of it by the officers of the court, in securing their dues, saddles him with no responsibility and endangers his rights in no way. As this portion of the judgment nominally recovered by him belongs to others, and not to him, he cannot satisfy it, or bargain it away with the other party to the record without their consent. He can waive his own rights, but he cannot waive the rights of others."

The St. Louis Court of Appeals in *Allen Trail v. William Somerville; Arba N. Crane, Appellant*, 22 Mo. App. 308, 1. c. 310-314, leaves no doubt as to the law in this state regarding the time an officer of the court shall receive a fee for services rendered. It holds, in a lengthy opinion, that he is not entitled to his fee until the litigation is at an end. The court said:

"The question is, whether in this state a referee has the power to withhold his report as a security for the payment of his compensation. We are of opinion that he has not. An examination of the statutes relating to referees (Rev. Stat., sects. 3605, 3626), shows that he is, for the purposes of the particular case, and within the scope of the order of reference, a judicial officer of the court clothed with large powers. By section 3626, Revised Statutes, he shall, in the absence of any special agreement, receive such compensation for his services as the court, in which the case is pending, may allow, not exceeding ten dollars per day. The statute does not in terms say that such allowance shall be taxed as costs, but the inference is irresistible that it is to be so taxed, and such has always been the practice, in the absence of special stipulations to the contrary. By section 986, Revised Statutes, 'if, at any time after

the commencement of any suit by a resident of this state, he shall become non-resident, or in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant, or any officer of the court, rule the plaintiff on or before the day in such rule named, to give security for the payment of the costs in such suit, and if the plaintiff fails to give security, the court may dismiss the suit. We are of opinion that a referee is an officer of the court within the meaning of this last statute, and that he may, in case the payment of his compensation is endangered, as therein provided, procure a rule on the plaintiff to give security for the costs, which will protect him in the payment of his compensation, whatever the ultimate termination of the suit may be. It is forcibly argued on behalf of the appellant that this statute ought not to be held to apply to referees, because it would be unseemly for a judicial officer of a court, who must decide a pending controversy between the parties, to bring himself into a state of antagonism with the plaintiff, by moving against him for a rule to give security for the costs. The answer to this is that it is entirely a matter of choice with a member of the bar, to whom a cause is referred, whether he will accept the office of referee or not. He is not, like the permanent officers of the court, obliged to perform certain prescribed duties for whomsoever shall call upon him to perform them; but he may accept the office or decline it, and he may subsequently accept it upon terms. He may, before accepting it, require that the plaintiff shall give security for the costs, or require that the parties shall, by stipulation, or otherwise, properly secure the payment of his compensation.

"It seems to have been the practice in the English courts of common law to allow an arbitrator to refuse the publication of his award until his charges are paid. *Musselbrook v. Dunkin*, 9 Bing. 605; *McArthur v. Campbell*, 5 Barn. & Ad. 518. The supreme court of New York in 1848, citing these and other English decisions to the same effect, held that this was the law. *Ott v. Schroepel*, 3 Barb. 56, 62. Decisions of the supreme court of New York have extended this rule to referees, and, as late as the year 1880, it was stated in the court of appeals of that state by Rapallo, J., arguendo, that a referee undoubtedly is not bound to part with his report without the payment of his legal fees. *Geib v. Topping*, 83 N. Y. 46. It was so held in *Little v. Lynch* (1 How. Pr. N. S. 95), decided by the supreme court of New York in 1885. It is also to be observed that the statute of New York provides in express terms for the taxation of the compensation of referees as costs. 3 Rev. Stat., N. Y. 1875, 533.

"But the practice touching the payment of costs in legal proceedings in this state seems to have departed very materially from the practice of the English courts of common law; and different principles prevail in this state touching the subject of costs from those which prevail in New York. By the ancient practice in England writs were purchased, and each party seems at every step in a proceeding to have paid the fees of the officers of the court for their services, as fast as such services were rendered. Indeed, the idea of requiring the plaintiff to give security for costs seems to have been to indemnify the defendant against the costs to which he might be put by the litigation in case it should turn out to be unfounded. Accordingly, the language of such a rule frequently was that the plaintiff be required to give security

for the defendant's costs. Roberts v. Roberts, 6 Dowl. P. C. 556; Anon, 1 Wils. 130. It does not seem to have been a part of the idea requiring security for costs, that the plaintiff should be required to give security for his own costs, since he was obliged to pay the ministerial officers of the court for their services, step by step, as the cause proceeded. Hence, when the cause had finally progressed to a judgment, so much of the judgment as related to costs recited that the plaintiff (or the defendant) recover his costs, the theory being that each party had paid his own costs as they accrued, and that the successful party was entitled to recover from the other party such costs as he had paid. Our entries of judgments preserve the same ancient form, although the costs are in fact collected for the benefit of the officers of the court in whose favor they are taxed, and are never paid to the successful party, except in exceptional cases where he may have paid them, and may be entitled to recover them. As litigation seems to have been thus conducted in the English courts upon what may be termed a cash basis, instead of upon a credit basis, as with us, no statute exists in that country, so far as we know, similar to our statute (Rev. Stat., sect. 986), allowing the ministerial officers of the court to move against the plaintiff in a pending suit for security for their fees. Such being the important difference between the English practice as to costs and our practice, the decision of the English courts, upholding the practice of arbitrators in refusing to publish their awards until their charges should be paid, would seem to have no application to the case of referees under our system. The learned counsel for the appellant, in citing to us the New York decisions already referred to, have pointed out that, under the New York statute, the fees of referees are taxable as costs in the case; and such undoubtedly is the rule, though not expressed in terms

under our statute. But they have not shown us that there is in New York such a statute as section 986 of our Revised Statutes, allowing the officers of the court to protect themselves by moving against the plaintiff for security for their fees. We have not been able to discover the existence of such a statute in New York, and the absence of it marks a very important distinction, applicable to the question before us, between the law of costs in that state and in this. Another very important distinction was adverted to in the opinion of this court, recently delivered in the case of *Roberts v. Nelson* (ante, p. 30), namely, that in New York an attorney has a lien upon the judgment of his client for his fees, whereas, no such lien is allowed in this state.

"Upon the whole, we are of opinion that a referee in this state is in no better position in respect of his costs than any other officer of the court. He is entitled to the same remedies which are accorded to them, and has the further advantage over them of being able to protect himself, by declining the reference, or by requiring the parties, as a condition of his entering upon the discharge of his duties, to secure the payment of his compensation. The rule which is here invoked, although not so stated in the printed arguments submitted to us, amounts, really to this, that a referee ought to have an artisans lien upon what he produces to secure the payment of his labor in producing it. If a referee ought to have such a lien, we see no reason why a sheriff or clerk ought not to have the same lien. But if a clerk should withhold a writ or refuse to draft the entry of a judgment, or if a sheriff should refuse to execute a writ or to serve a subpoena, until his fee should be paid, such conduct would be justly regarded as illegal and oppressive. The duties discharged by a referee are analogous to those discharged by a jury; but what would be thought if a jury in a court of record, should come into court with

a sealed verdict and announce to the court that they were ready to deliver it whenever the parties paid to the jurors their per diem?

"It seems unnecessary to prolong this argument. The system of paying costs in advance, or step by step, to the officers of the court, has never obtained in this state as in England, but in lieu of this the statute has conferred upon such officers the power to require security for their costs, as already pointed out. They may have this security; but, nevertheless, except where interlocutory orders awarding costs are made, they must, as a general rule, wait for their payment until the final determination of the suit. It results from these views, that we are of opinion that the circuit court was right in ruling the referee to file his report before the payment of his compensation, which had been fixed by the court."

With the facts standing as they do in your proposition it appears that no judgment has been entered one way or the other regarding the alleged insane person referred to in your letter.

Section 9339, R. S. Mo. 1939, states:

"If, after such examination, the court, or the jury, if one shall have been employed, shall be satisfied of the truth of the facts set forth in the statement, the court shall cause a suitable order to be entered of record, upon their own decision, or, where the verdict of the jury has been rendered, upon the verdict. And such order shall further set forth that the person found to be insane is a fit subject to be sent to a state hospital (naming the particular hospital), to undergo treatment therein; and shall further require the medical witness forthwith to make out such a detailed history of the case as is required by section 9332; and, also, that

October 22, 1945

the costs of this examination be paid out of the treasury of the county; and, also, that the clerk of the court forthwith forward a certified copy of said order of court to the superintendent of the hospital, accompanying the same with a request of admission of the person found to be insane to the hospital."

The case of *In re Moynihan*, 62 S. W. (2d) 410, 332 Mo. 1022, holds in brief that under this statute a preliminary order for the temporary confinement of an alleged insane person is not a valid final adjudication of the fact of insanity, but the statutory hearing must still be had.

Conclusion

Therefore, in view of the foregoing authorities, it is the opinion of this department that the sheriff is not entitled to his fee for services rendered until a valid final adjudication of the fact of insanity is had.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

BOARD OF HEALTH: Children born in wedlock are presumed to be legitimate, but if person filling in standard certificate of live birth is informed that child is illegitimate it must be so recorded on certificate.

August 30, 1945



Dr. R. M. James
State Board of Health
Jefferson City, Missouri

Dear Sir:

This acknowledges receipt of your several communications requesting an opinion for the Bureau of Vital Statistics upon the following proposition:

What is the proper procedure to be followed in filling in certain spaces in the standard certificate of live birth issued by the State Board of Health when the answer in Space 8 of that form is that the mother is married and the mother, or other person giving the information to the person filling out the birth certificate, gives the information that the child is illegitimate.

The sections of the Missouri Statutes requiring the registration of births is covered in Sections 9771, 9772, 9773, 9774, 9775 and 9782, R. S. Mo. 1939.

Section 9771 requires that all births that occur in the state shall be immediately registered in the district in which they occur, as hereinafter provided.

Section 9772 provides:

"It shall be the duty of the attending physician or midwife to file a certificate of birth, properly and completely filled out, giving all the particulars

required by this article, with the local registrar of the district in which the birth occurred, within ten days after the date of the birth. And if there be no attending physician or midwife, then it shall be the duty of the father or mother of the child, householder or owner of the premises, manager or superintendent of public or private institutions in which the birth occurred, to notify the local registrar within ten days after the birth of the fact of such birth having occurred. It shall then, in such case, be the duty of the local registrar to secure the necessary information and signature to make a proper certificate of birth: Provided, that in cities the certificate of birth shall be filed at a less interval than ten days after birth, if so required by municipal ordinance (or regulation) now in force or that may hereafter be enacted."

Section 9773 provides what the birth certificate shall contain, as follows:

"The certificate of birth shall contain the following items:

"(1) Place of birth, including state, county, township or town, village or city. If in a city, the ward, street and house number; if in a hospital or other institution, the name of the same to be given, instead of the street and house number.

"(2) Full name of child. If the child dies without a name, before the certificate is filed, enter the words 'died unnamed.' If the living child has not yet been named at the date of filing certificate of birth, the space for 'full name of child' is to be left blank, to

be filled out subsequently by a supplemental report, as hereinafter provided.

"(3) Sex of child.

"(4) Whether a twin, triplet, or other plural birth. A separate certificate shall be required for each child in case of plural birth, giving number of child in order of birth.

"(5) Whether legitimate or illegitimate.

"(6) Full name of father.

"(7) Residence of father.

"(8) Color or race of father.

"(9) Birthplace of father; city or town, state or foreign country.

"(10) Age of father at last birthday, in years.

"(11) Occupation of father. (Answers shall not be recorded to items 6, 7, 8, 9, 10 and 11 in case of illegitimate births.)

"(12) Maiden name of mother.

"(13) Residence of mother.

"(14) Color or race of mother.

"(15) Birthplace of mother; city or town, state or foreign country.

"(16) Age of mother at last birthday in years.

"(17) Occupation of mother.

"(18) Number of child of this mother, and number of children of this mother now living.

"(19) Born at full term.

"(20) The certificate of attending physician or midwife as to attendance at birth, including statement of year, month, day and hour of birth, and whether the child was alive or dead at birth. This certificate shall be signed by the attending physician or midwife, with date of signature and address; if there is no physician or midwife in attendance, then the father or mother of the child, householder or owner of the premises, or manager or superintendent of public or private institution, or other competent person, whose duty it shall be to notify the local registrar of such birth, as required by section 9772 of this article.

"(21) Exact date of filing in office of local registrar, attested by his official signature, and registered number of births, as hereinafter provided.

"All certificates, either of birth or death, shall be written legibly, in unfading black ink, and no certificate shall be held to be complete and correct that does not supply all of the items of information called for herein, or satisfactorily account for their omission."

It is the duty of the attending physician, or midwife, to file the above certificate of birth, properly and completely filled out, giving all the particulars required in Section 9773, with the local registrar of the district in which the birth occurred, within ten days after the date of the birth. And, if there be no attending physician or midwife, then it shall be the duty of the father or mother of the child, householder or owner of the premises, manager or superintendent of public or private institutions in which the birth occurred, to notify the local registrar within ten days after the birth, of the fact of such birth having occurred. It shall then, in such case, be the duty of the local registrar to secure the necessary information and signature to make a proper certificate of birth.

Section 9773, subsection (21), supra, requires that
" * * * all certificates, either of birth or death, shall be
written legibly, in unfading black ink, and no certificate
shall be held to be complete and correct that does not
supply all of the items of information called for herein,
or satisfactorily account for their omission."

Section 9782 provides:

" * * * And any physician or midwife in
attendance upon a case of confinement,
or any other person charged with respon-
sibility for reporting births, in the
order named in section 9772 of this
article, who shall neglect or refuse to
file a proper certificate of birth with
the local registrar, within the time
required by this article, shall be
deemed guilty of a misdemeanor, and,
upon conviction thereof, shall be fined
not less than five dollars nor more than
fifty dollars. * * * And any person who
shall willfully alter any certificate of
birth or death, or the copy of any certi-
ficate of birth or death, on file in the
office of the local registrar, shall be
deemed guilty of a misdemeanor, and, upon
conviction thereof, shall be fined not
less than ten dollars nor more than one
hundred dollars, or be imprisoned in the
county jail not exceeding sixty days, or
suffer both fine and imprisonment, in
the discretion of the court. And any
other person or persons, who shall vio-
late any of the provisions of this art-
icle, or who shall willfully neglect or
refuse to perform any duties imposed upon
them by the provisions of this article,
or shall furnish false information to a
physician, undertaker, midwife, or infor-
mant, for the purpose of making incorrect
certification of births or deaths, shall
be deemed guilty of a misdemeanor, and,
upon conviction thereof, shall be fined
not less than five dollars nor more than
one hundred dollars. * * * * *

The policy of the law is to confer legitimacy upon children born in wedlock and there is a presumption that a child so born is the child of the husband and is legitimate. 10 C. J. S. page 18. So firm was this presumption originally it could not be rebutted unless the husband was incapable of procreation or was absent beyond the four seas, that is, absent from the realm, during the whole period of the wife's pregnancy. This strict rule was, however, relaxed and eventually repudiated or, at least, greatly modified, and gave way to the modern doctrine that the presumption may be rebutted by competent and relevant evidence showing that the husband could not have been the father of the child.

The commonly accepted statement of the facts which will overcome the presumption under the modern doctrine is that the presumption of the legitimacy of a child born in wedlock may be wholly removed by proper and sufficient evidence, showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. 10 C. J. S., supra. Even under the modern rule, however, the presumption is a strong one, one of the strongest and most persuasive known to the law, which means that, in addition to performing its essential function as a rule of evidence, the presumption, like the presumption of innocence, is accompanied by another rule that it becomes conclusive in the absence of any sufficient proof that the husband could not have been the father. In *Needham v. Needham*, (Mo. App.) 299 S. W. 832, citing numerous authorities, it is stated, 1. c. 834:

"It is well agreed among all the authorities that a child born in wedlock is presumed to be legitimate, until the contrary is shown. Indeed, such presumption is one of the strongest known to the law, so jealously regarded, in fact, that the courts will not permit it to be overthrown, unless there is no judicial escape from that dire conclusion. * * * * *

August 30, 1945

The person authorized and required to fill out the standard certificate of live birth enters upon the certificate information supplied by the mother of the child, or other persons. Under the provisions of Section 9732 it would be a misdemeanor to furnish false information to a physician, undertaker, midwife, or informant, for the purpose of making incorrect certification of births.

In case the mother, or person giving the information to the person filling out the birth certificate, gives the information that the child is illegitimate, then the answers to items 6, 7, 8, 9, 10 and 11 of Section 9773, supra, as set out in items 9, 10, 11, 12, 13 and 14 of the standard certificate of live birth, should not be recorded.

In case the mother of the child is married and refuses to give the information required in items 6, 7, 8, 9, 10 and 11 above, as set out in items 9, 10, 11, 12, 13 and 14 of the standard certificate of live birth, then the person filling out the standard certificate will state in the blank spaces that the answers were refused, or satisfactorily account for their omission.

CONCLUSION

Therefore, it is the opinion of this department that (1) in the event the mother, or other person giving the information to the person filling out the birth certificate, gives the information that the child is illegitimate, then in item 8 of the standard certificate of live birth should also be entered "illegitimate" and the answers to items 9, 10, 11, 12, 13 and 14 of said certificate should not be recorded, and that (2) in the event items of information required under Section 9773, R. S. Mo. 1939, are omitted, a satisfactory reason for such omission must be stated.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

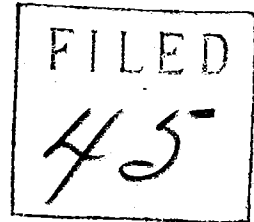
APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

CHIROPODY: "Podiatry" is synonymous with "chiropody," and State Board of Health may determine eligibility of any applicant for admission to practice in this state.

October 5, 1945



10/20

R. M. James, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter requesting an opinion, dated October 4, 1945, as follows:

"Dr. Samuel Zuckerman, Chiropodist, 7731 Gannon Avenue, St. Louis, Missouri, who has been serving in the Army, and is a graduate of the First Institute of Podiatry, New York City, June 3, 1939, is asking permission to take the examination in Chiropody. It seems that the Chiropody Advisory Board, appointed by the State Board of Health of Missouri, is objecting to Dr. Zuckerman taking the examination for the reason that it would be contrary to the Laws of Missouri, Session Acts 1943, Section 9798. They claim that since the First Institute of Podiatry does not teach the degree of D. S. C. (doctor of surgical chiropody) that he should not be permitted to take the examination.

"In your opinion, would the board be acting contrary to the Laws of Missouri, Session Acts 1943, in permitting this party to take the Chiropody examination."

Attached to your request was a folder issued by the National Association of Chiropodists, Washington, D. C. This folder states that the First Institute of Podiatry of New York, N. Y., from which the applicant graduated in 1939, is one of

October 5, 1945

six colleges approved by the National Association of Chiropodists.

The folder also states that the word "podiatry" is synonymous with "chiropody," being used in the regulatory laws of a few states instead of "chiropody." A search of the statutes of various states reveals that this is true, and that New York, the District of Columbia, and other jurisdictions commonly use the word "podiatry," in each case stating that it is synonymous with "chiropody."

We note that the applicant in question is a graduate of a New York school, and reference to the New York Statutes reveals Section 1415, Article 53, Public Health Laws of New York, which is as follows:

"Whenever the word 'podiatry' is used in this article or in any other law, the word 'chiropody' shall be considered as having the same meaning and effect and whenever the word 'podiatrist' is used in this article, or in any other law, the word 'chiropodist' shall be considered as having the same meaning and effect."

We also find the following definition of the science of "podiatry" in Section 1401, Article 53, Public Health Laws of New York:

"The practice of podiatry is defined as follows: For the purpose of this article 'chiropody' or 'podiatry' shall be held to be the diagnosis of foot ailments and the practice of minor surgery upon the feet limited to those structures of the foot superficial to the inner layer of the fascia of the foot, the palliative and mechanical treatment of deformities and functional disturbances of the feet, but it shall not confer the right to treat communicable or constitutional diseases of the bones, ligaments, muscles or tendons of the feet or any other part of the body, or to perform any operation on the

bones, ligaments, muscles or tendons of the feet involving the use of any cutting instrument or the right to use any an-aesthetics other than local."

An Act of Congress of May 23, 1918 (40 Stat. 560), gives the following definition:

"Podiatry (or chiropody) is hereby defined to be the surgical, medical or mechanical treatment of any ailment of the human foot, except the amputation of the foot or any of the toes, and, also, except the use of an anesthetic other than a local one."

The latter definition corresponds very closely to that found in the laws of Missouri, Section 9796, R. S. Mo. 1939, which is as follows:

"The definition of the word 'chiropody' shall, for the purpose of this article, be held to be the local, medical, mechanical or surgical treatments of the ailments of the human foot, and massage in connection therewith except amputation of the foot or toes, or the use of anaesthetics other than local, or the use of drugs or medicine other than local antiseptics."

The State Board of Health may, therefore, treat the terms "podiatry" and "chiropody" as synonymous in considering the qualifications of the applicant mentioned.

To be admitted to registration as a practitioner of chiropody in this state, an applicant is now required to comply with Section 9798, Laws of 1943, page 582, which is as follows:

"Any person not entitled to registration as aforesaid, who shall furnish the board with satisfactory proof that he or she is

twenty-one years of age or over, and of good moral character, and a citizen of the United States, and that he or she has received at least four years' high school training, or the equivalent thereof, as determined by the board, and has received a diploma or certificate of graduation from a reputable school of chiropody conferring the degree of D.S.C. (doctor of surgical chiropody) and recognized and approved by the State Board of Health, having a minimum requirement of three scholastic years, shall, upon payment of a fee of twenty-five dollars, be examined, and if found qualified, shall be registered, and shall receive in testimony thereof a certificate signed by the chairman and secretary of the board: Provided, that the state board of health may, under regulations established by the board, admit without examination legally qualified practitioners of chiropody who hold certificates to practice chiropody in any state or territory of the United States or the District of Columbia with equal educational requirements to the state of Missouri and that extend like privileges to legally qualified practitioners from this state upon the applicant paying to the state board of health a fee of fifty dollars (\$50.00)."

An examination of the previous statute, amended by that just above quoted, reveals that the requirements were raised to require a diploma from a reputable school of chiropody, having a minimum requirement of three scholastic years, the previous requirement being only two years. The last act also provided for recognition and approval of the school of chiropody concerned by the State Board of Health, and required that the school have authority to confer the degree of doctor of surgical chiropody.

Reference to the folder, above-mentioned, discloses that the First Institute of Podiatry of New York has an entrance requirement of two years college work and that the professional course extends over a period of four years. Appli-

October 5, 1945

cant states that he is a graduate of this school, and he was apparently invested with a degree from the school. The statements contained in this folder are not accepted as proof of the facts stated, but those facts, in the final analysis, should be determined by the State Board of Health.

It is believed that the foregoing will enable the State Board of Health to arrive at a proper conclusion by a determination of the facts surrounding the qualifications of the applicant and the standing of the school from which he received his training.

CONCLUSION

It is our conclusion that "podiatry" and "chiropody" are synonymous terms, and that an applicant for registration to practice chiropody in this state may be permitted to take the examination required by Section 9798, Laws of Missouri, 1943, page 582, in the discretion of the State Board of Health, if the board shall determine that he has met the necessary educational requirements at a school of chiropody or podiatry recognized and approved by the State Board of Health. The board may approve such school if it grants a degree equivalent to that of doctor of surgical chiropody, although given another designation.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

MUTUAL INSURANCE COMPANIES: 1) Mutual Insurance Companies organized under Art. 7, Chap. 37, R.S. Mo. 1939, are not subject to general laws governing stock insurance companies, including statutes vesting in the State Department of Insurance regulation over rates charged by stock companies, and, 2) Mutual Insurance Companies organized under said Art. 7, Chap. 37, may issue a non-assessable policy if such company has a surplus guarantee fund of at least \$100,000.00.

December 27, 1945

FILED

45

Honorable Owen G. Jackson
Superintendent of Insurance
of Missouri
Jefferson City, Missouri

Dear Superintendent Jackson:

Your letter of recent date, requesting an opinion from this Department, has been received.

Your letter submits two questions to be answered in the opinion:

First: "(a) Whether a mutual insurance company, organized under the provisions of Article 7, Chapter 37, is subject to the provisions of Article 8, Chapter 37, vesting in the State Department of Insurance certain regulation and control over rates charged for specified types of insurance; and

Second: "(b) Whether a mutual insurance company, organized under Article 7, Chapter 37, may issue a so-called non-assessable policy if such company has a surplus of at least \$100,000.00."

Section 5971, Article 8, Chapter 37, R.S. Mo. 1939, provides that insurance companies doing a fire, lightning, or hail or windstorm insurance business in this State shall maintain a public rating record as an incident to the publicity and the regulation of the fairness of rates charged by such insurance companies. That part of said Section 5971, so providing, is as follows:

"Every fire insurance company or other insurer authorized to effect

December 27, 1945

insurance against the risk of loss by fire, lightning, hail or wind-storm shall maintain a public rating record from which the rate of premium applicable to each risk in this state to be written by such company or other insurer may be ascertained in advance of the making of insurance thereon. * * * "

Section 5967, of said Article 7, Chapter 37, exempts mutual insurance companies organized under said Article 7 from all other general laws governing insurance in this State. Said Section 5967, so providing, is as follows:

"This article to govern. Except as provided herein, or as such companies may be hereafter expressly designated in any other law, insurance companies organized or admitted to do business in this state under this article shall not be subject to any other law of this state governing insurance companies. (R.S. 1929, Sec. 5856.)"

Section 5967, exempting or excepting mutual insurance companies organized under Article 7, Chapter 37, R.S. Mo. 1939, was enacted at the 1919 session of our Legislature, Laws 1919, page 397. Article 8, Chapter 37, R.S. Mo. 1939, including Section 5971, was in existence at the time Section 5967 was enacted. Section 5967 states that mutual insurance companies organized under said Article 7, shall be exempt from general insurance laws unless expressly designated in such other law as coming within its terms. There is no express provision contained in said Article 8, Chapter 37, making mutual insurance companies organized under said Article 7, Chapter 37, subject to the terms of said Article 8, respecting rates or the filing and maintenance of a public rating record in the office of the Superintendent of Insurance. It would thus appear that the positive terms of said Section 5967, exempting mutual companies from general insurance laws, would be conclusive, in the absence of any express terms of any other law bringing them under its terms, that mutual insurance companies are not subject to the rating regulations as set forth in said Article 8. Mutual companies make among their members all conditions and agreements contained in their policies.

December 27, 1945

Stock companies create and fix in an ex-parte contract in the first instance, all of the terms and conditions of the policies, as well as the premium which the buyer must pay under the rates they promulgate. The policy buyer may take it or leave it. It is not the contract of the policy buyer until he agrees to all of the conditions, provisions, and rates fixed by stock insurance companies. He has no voice in any of its terms or conditions nor the making of the rates which control the premiums he must pay for the protection. The two plans, mutual on the one hand, and stock insurance on the other hand, are entirely different and opposed to one another in principle and practice. The statutes governing each plan of insurance are necessarily separate and different. This, we believe, was the reasoning adopted by the Legislature in enacting such exemption statutes.

Mutual insurance is defined in 32 C.J., page 1018, very aptly as follows:

"Mutual insurance is that system of insurance by which the members of the association or company mutually insure each other. It is that form of insurance in which each person insured becomes a member of the company, and members reciprocally engage to indemnify each other against losses, any loss being met by an assessment laid on all members. * * *".

Our Supreme Court in the case of State vs. Mfg'r's. Mutual Insurance Co., 91 Mo. 311, l.c. 318, of mutual insurance business, said the following:

"* * * The theory of mutual insurance, as generally understood, is, that the premiums paid, or to be paid, by the members for their insurance, constitute a fund for the liquidation of losses. It is not essential that the premiums should be paid by note. They may be paid in cash, and when so paid the cash stands for the note. The policy is still a mutual policy, and the holder thereof a member of the association. * * *".

Mutual insurance as thus defined in the above quoted citations becomes a reciprocal, mutual agreement between persons whereby the insured becomes the insurer in each policy of insurance.

Stock insurance rates are fixed solely by the companies themselves. Hence the necessity for the enactment of said Section 5971 and other sections of Article 8, Chapter 37, R.S. Mo. 1939, to supervise rates of stock companies.

In the case of Pfiester vs. Missouri State Life Insurance Company, which was before the Supreme Court of Kansas, reported in 116 Pacific Reporter, 245, l.c. 247, the Court, concerning the policies written by the companies, had this to say:

"* * * Few persons solicited to take policies understand the subject of insurance or the rules of law governing the negotiations, and they have no voice in dictating the terms of what is called the contract. * * *".

The above cited case was a life insurance case, it is true, but the same facts exist and the same rule of law applies in the making of rates exclusively by stock insurance companies, other than life, as applied in and which were being considered by the Court in the Kansas case.

It would seem then that there would not only be no just reason for mutual insurance to be subject to the terms of the rating statutes requiring them to keep a rating record, as is provided in said Section 5971, but it would result in hardship and confusion if they were required to keep a rating record, and comply with other general insurance laws which have nothing in common with and are not responsive to the mutual plan of insurance.

There are a number of sections of our statutes exempting other mutual insurance companies from the general insurance laws of the State. One of such is Section 6186, R.S. Mo. 1939, which in part, is as follows:

December 27, 1945

"Hereafter all town mutual fire and lightning, tornado, windstorm or cyclone insurance companies organized for the sole purpose of mutually insuring the property of its members against any loss incurred by them from fire, lightning or windstorm, as may be provided by its constitution and by-laws, and not inconsistent with the provisions of this article, shall be exempt from all laws of the state of Missouri governing other insurance companies: * * *".

Chapter 14, Article 37, R.S. Mo. 1939, deals with County Mutual Insurance Companies. Section 6175, exempting such companies from general insurance laws, is as follows:

"All companies incorporated under the provisions of this article are hereby exempted from the operation of all other general statutes of this state in regard to insurance, but such companies shall be subject, as far as applicable, to the provisions of article 1, chapter 33, R.S. 1939. (R.S. 1929, sec. 6055.)"

There are still other such statutes in this State so exempting other kinds of mutual insurance companies from general insurance laws, but we believe those above quoted will be sufficient to clearly indicate that the intention of the Legislature has always been to exempt all mutual and fraternal companies from all general insurance laws of the State, and to make them subject only to the laws governing such companies in the article of the chapter under which they are organized. Our Supreme Court has so declared in the case of Westerman vs. Lodge, 196 Mo. 670. This was a case where the question arose whether the provisions of the non-forfeiture insurance statute, Section 7897, R.S. Mo. 1899, applied to fraternal beneficiary insurance companies. The Supreme Court held that it did not. The Court held that fraternal beneficiary insurance companies were exempt from all general insurance laws of this State. The Court in so holding, l.c. 731, said:

"No one can read the numerous acts

December 27, 1945

of the Legislature from the time fraternal beneficiary associations were authorized to do business in this State without being convinced beyond question that it has ever been the policy of this State to exempt such associations from the general insurance laws applicable to regular or old-line insurance.
* * * "

This holding would apply to mutual insurance companies, we think, with like effect as it was then applied to fraternal companies.

We believe the language of said Section 5967, is so clear and direct that it was without doubt the intention of the Legislature to exempt, absolutely, mutual insurance companies from the operation of all general insurance laws of this State, including the terms of said Section 5971, supra. This answers your first question.

Proceeding to your second question:

"(b) Whether a mutual insurance company, organized under Article 7, Chapter 37, may issue a so-called non-assessable policy if such company has a surplus of at least \$100,000.00."

The basis and authority upon which non-assessable policies may be issued by mutual insurance companies organized under Article 7, Chapter 37, R. S. Mo. 1939, are contained in Section 5959 of said Article and Chapter. That Section is as follows:

"The maximum premium payable by any member shall be expressed in the policy or in the application for the insurance. Such maximum premium may be a cash premium and an additional contingent premium not less than the cash premium, or may be solely a cash premium. No policy shall be issued for a cash premium without an additional contingent premium unless the company has a surplus of at least one hundred thousand dollars or a surplus which is not less in amount

than the capital stock required of domestic stock insurance companies transacting the same kinds of insurance. "

The question is whether mutual insurance companies organized under said Article 7, may issue non-assessable policies, that is to say, a policy where the premium is paid in cash without an additional contingent premium if the company has established and maintains a guarantee fund of \$100,000.00 without any other conditions respecting the amount of the guarantee fund.

The fundamental rule of the construction of any statute is to arrive at and give effect to the intention of the Legislature in passing a statute. 59 C.J., page 948, states it like this:

"As the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, * * * give effect, * * * to the intention or purpose of the legislature as expressed in the statute. * * * ".

In one of the many decisions by our Supreme Court announcing the same rule of construction is the case of State ex rel. Koeln vs. Telephone Co., 316 Mo. 1008, l.c. 1012, where our Supreme Court said:

"* * * While it is true that the intention of the Legislature must control in the interpretation of a statute, that intention must be gathered from the language which they use in the act. * * * ".

In arriving at the intention of the Legislature in enacting said Section 5959, we may take into consideration what the Legislature had in mind in expressing its intention in said Section 5959, by what it said in Section 5919 of Article 6. Said Article 6, deals with mutual insurance companies. Said Section 5919 of said Article 6, is in part, as follows:

December 27, 1945

"No company formed upon the mutual plan for the purpose of doing the fire and marine business designated in the first of the three classes of insurance named in section 5904 shall, unless the company is to be formed with a guarantee fund, commence to do business until agreements have been entered into for insurance with at least two hundred applicants, the premiums on which shall amount to not less than one hundred thousand dollars, * * *".

If said Section 5919 in outright terms permits mutual insurance companies organized under said Article 6, to commence and carry on business with a guaranty fund of \$100,000.00, we believe we may take that Section for an example of the intention of the Legislature in the terms used in said Section 5959 that a mutual insurance company organized under said Article 7, should also exercise the same privilege of beginning and transacting business with a reserve or guarantee fund of \$100,000.00.

The terms of said Section 5959, are in the alternative. It would seem that said Section could only reasonably be construed as giving a mutual company the right of transacting its business in the first instance, by accepting cash premiums without any additional contingent premium if such company had and maintains a reserve of \$100,000.00, or if in the alternative, such company desired to maintain a reserve as a matter of competition with stock companies, equal to the capital stock of a domestic stock insurance company in the amount of \$200,000.00 as a selling inducement in its business, it would have the right to increase its reserve to the amount of \$200,000.00. But that such company is not compelled to maintain a reserve equal to the capital stock in the sum of \$200,000.00 unless it wishes to do so. The Legislature uses the disjunctive particle "or". Surely it may not be reasonably said that the disjunctive "or" as used in said Section 5959 may be converted into the conjunctive "and". This would require the two-fold maintenance of a reserve of both \$100,000.00 and a surplus of \$200,000.00, the capital stock required of domestic stock insurance companies transacting the same kinds of business. We do not

December 27, 1945

believe the Legislature intended anything of the kind. We believe they intended that such mutual companies, organized under said Article 7, may maintain a surplus of \$100,000.00 as a basis of issuing non-assessable policies, or if it chooses, it has the privilege of maintaining a surplus of \$200,000.00 for the same purpose.

Webster's International Dictionary, page 1712, defines "or" as: "A co-ordinating particle that marks an alternative; as you may read or may write, -- that is, you may do one of the things at your pleasure, but not both."

Our Supreme Court in the case of Jones vs. Railroad Co., 178 Mo. 528, l.c. 539, defining the meaning of the word "or", and stating the interpretation to be put upon its use states the following:

"* * * The word 'or' which the pleader has here used, may be used in two forms. In one it corresponds to either, and in that sense the term 'proper or necessary,' that is, one or the other, * * *".

Authorities outside the State of Missouri also adopt the same construction of the use of the word "or" as given to it by our Supreme Court. The Supreme Court of the State of Florida in the case of Cherry Lake Farms vs. Love, 176 So. Rep. 486, l.c. 488, states the following:

"In construing the language used in section 3223, R.G.S., section 5029, C.G.L., this court in the case of Pompano Horse Club, Inc., et al. v. State ex rel. Bryan, 93 Fla. 415, 111 So. 801, 805, 52 A.L.R. 51, said:

"The statute provides that 'the state's attorney, county solicitor, county prosecutor, or any citizen of the county through any attorney he may select, may maintain his action,' etc.

"In its elementary sense the word 'or' is a disjunctive particle that

December 27, 1945

marks an alternative, generally corresponding to "either," as "either this or that"; a connective that marks an alternative. * * * "

The Illinois Court of Appeals in the case of Field vs. Freed, 191 Ill. App. Rep. 619, l.c. 623, 624, gave its construction of the meaning of the word "or" by saying:

"It will be noted that the clause 'at the election of the plaintiff,' which is contained in the section of the Justices' Act that was under consideration in the case cited, is not found in section 4 of chapter 77, or elsewhere in that chapter, which relates to judgments and executions in courts of record. Nevertheless, the word 'or,' even without that clause, imports a choice between two alternatives. As ordinarily used, it means 'one or the other of two, but not both.' * * * "

We believe the brief supplied to your office by Mr. Sappington correctly points out the proper legal principles applying here in the construction of said Section 5959. We believe his comments are meritorious, and that he correctly interprets the meaning of said Section. We take the liberty of quoting here some of his comments as follows:

"* * * The statute is so written that the clauses describing the amount of surplus are independent of each other, and either could have been placed first in order in the statute and the meaning would have been the same.

"Furthermore, the surplus required of domestic stock insurance companies

December 27, 1945

was at the time of the enactment of the statute the sum of \$200,000.00, and therefore a holding that that is the amount of surplus which must be held by a mutual company before issuing so-called nonassessable policies would give to the clause 'a surplus of at least \$100,000.00' no meaning at all."

We believe, considering the above cited and quoted authorities, that said Section 5959, permits the issuance of non-assessable policies by companies organized under said Article 7, provided it has either a surplus of at least \$100,000.00, or if they so desire, may in the alternative, provide a surplus which is not less in amount than the capital stock required of domestic stock insurance companies transacting the same kind of insurance, which, in that event, would be \$200,000.00.

CONCLUSION.

It is, therefore, the opinion of this Department that:

a) Mutual insurance companies organized under the provisions of Article 7, Chapter 37, R.S. Mo. 1939, are not subject to the provisions of Article 8, Chapter 37, R.S. Mo. 1939, vesting in the State Department of Insurance regulation and control over rates charged for specific types of insurance; and

b) That mutual insurance companies organized under Article 7, Chapter 37, R.S. Mo. 1939, may issue a so-called non-assessable policy if such companies have a surplus of at least \$100,000.00.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
Attorney General

GEORGE W. CROWLEY
Assistant Attorney General

GWC:ir

MISSOURI COMMISSION
FOR THE BLIND.

: Last proviso in Section 9456
: construed; also, method for
: striking names from the
: blind pension roll by the
: State Auditor.
:
:
:

FILED

46

January 17, 1945

Missouri Commission for the Blind
Administrative Office
102 State Office Building
Jefferson City, Missouri

Attention: Mrs. Lee Johnston

Gentlemen:

We have your request for an opinion from this department, of January 10, 1945. We here quote your request:

"As per our conversation of January 9, I would be glad to have you advise me your opinion of the following procedure to remove Blind Pensioners from the rolls because of begging.

"The Blind Pension Law makes no provisions for the manner in which this shall be done. Do you think that securing two or more affidavits from persons who have seen the blind person engaged in begging and then allow the blind person to have a hearing before the Board or before the person or persons appointed by the Board would be a proper procedure before removing the blind person from the rolls?"

At the outset we quote a pertinent part of Section 9451 R. S. Mo., 1939, as amended, p. 786 L. 1943. It might be well to state that this section has to do with the procedure and limitations upon the commission in determining the eligibility of persons to receive pensions. Said section contains the following proviso:

"* * * and provided further, that blind persons who are maintained in either public, private, or endowed institutions, or by private persons, who would otherwise be entitled to a pension under this article, shall not be entitled to

Jan. 17, 1945

the benefits of this article; and provided further, that no blind person shall be entitled to the benefits of this article while confined in any jail or penitentiary under conviction of any offense or while publicly soliciting alms in any manner or through any artifice in any part of this state or while confined in any insane asylum at the expense of the state or any county or municipality thereof. R. S. 1929, Sec. 8893."

The reason that we quote the first proviso is because of the fact that this proviso has been construed in the case of State ex rel. Palmer v. Thompson, 297 S. W. 2d 62, and this case is controlling so far as it could be said to be analogous in referring to the last proviso contained in section 9451. Therefore, on page 63 of the opinion we find this wording:

"Under the 1923 act, the fact that relator is and was being maintained in a publicly supported institution automatically deprived her of the right to receive a pension. The commission certified that fact to the auditor. It thereupon became the duty of the respondent, as such auditor, to strike the name of relator from the blind pension rolls. * * *"

We wish to point out that the court has seen fit to use the word "automatically" and further, the court emphasizes that the Commission should certify the fact to the auditor, whereupon, the duty devolved upon the auditor to strike the name of the person from the blind pension rolls.

The last proviso contained in section 9451, in our view, is not ambiguous, for such proviso in part reads as follows:

"* * * provided further, that no blind person should be entitled to the benefits of this article. * * * While publicly soliciting alms in any manner. * * *"

Jan. 17, 1945

It is our view that this language is clear. In this connection we call attention to the case of Dahlin v. Missouri Commission for the Blind, 262 S. W. p. 420, l. c. 423, par. 8, wherein the court said:

"A statute that is clear in its terms, and leaves no room for construction must be enforced as written, * * *"

Now turning to the case of State ex rel. Smearing v. Thompson, 45 S. W. (2d) 1078, l. c. 1079, par. 2, wherein the court had this to say in passing upon section 8893 R. S. Mo. 1929, and in substance is now section 9451 L. 1943, p. 786. Section 8900 R. S. Mo. 1929, (which section is now 9458 R. S. Mo. 1939), and section 8896 R. S. Mo. 1929, (which is now section 9454 R. S. Mo. 1939).

We quote as follows from the Smearing case:

"Section 8893 (Revision of 1929) provides that an adult blind person having the qualifications therein prescribed 'shall be entitled to receive, when enrolled under the provisions of this article, an annual pension' etc. One is 'enrolled under the provision of this article' when his name is placed on the blind pension roll by the state auditor. Section 8900. When enrolled the pensioner is entitled to a pension from the date of the filing of his application with the probate court. An applicant's name is placed on the blind pension roll upon certification by the commission for the blind; it is stricken from the roll upon a like certification when the commission, after notice and hearing, determines that the pensioner is no longer qualified to receive a pension. Section 8896. * * *"

It will be noted from a reading of the above quoted portion that an applicant's name is placed upon the blind pension roll upon certification by the Commission for the Blind and that his name is stricken from the roll upon a like certification when the Commission, after the notice and hearing, determines

Jan. 17, 1945

that the pensioner is no longer qualified to receive a pension.

CONCLUSION.

It is therefore, the opinion of this department that the receipt of affidavits or other information by the Commission for the Blind, to the effect that any pensioner in publicly soliciting alms, in any manner, would be sufficient cause for the Commission to give notice and grant a hearing to such a pensioner, to determine whether or not, his name should be stricken from the pension rolls by the State Auditor. Of course, the State Auditor should first receive a certificate from the Blind Commission, that such pensioner is no longer entitled to participate in the benefits of Article 1, Chapter 54, R. S. Mo. 1939, before striking the name of such person from the roll.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

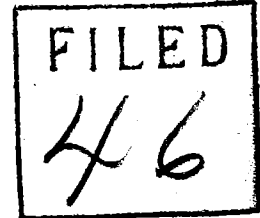
APPROVED:

HARRY H. KAY
Acting Attorney General

BRC:LeC

BLIND PENSIONS: Commission in determining residence is not bound to follow declared intention but may consider all available facts.

May 14, 1945.



Mrs. Lee Johnston, Executive Director
Missouri Commission for the Blind
102 Capitol Building
Jefferson City, Missouri

Dear Mrs. Johnston:

Under date of May 3, 1945, you wrote this office requesting an opinion as follows:

"On February 25, 1943, the Missouri Commission for the Blind granted Mr. James E. Jennings, #26 Taney County, a ninety-day leave of absence, from the State of Missouri.

"On May 26, Mr. Jennings' daughter wrote that her father would return to Missouri just as soon as he possibly could; that her brother and family would try to bring him back in the fall if they could get gasoline to do so. We replied that his June 30 payment would be withheld until it was definitely decided that he would return to Missouri.

"We heard nothing further and wrote again on June 22, and again on August 6, and on August 10 heard from Mr. Jennings that he wanted to come back to Missouri as soon as his son could make arrangements. We advised him that as soon as we heard he had returned to Missouri to make his home here, we would authorize the State Auditor to release his back pension check.

May 14, 1946

"On September 15, Mr. Jennings advised that he would be back in Missouri by the 15th or 20th of November and would notify us when he got here.

"In November, 1944, the State Auditor's office advised us that Mr. Jennings had had no pension payment since July, 1943, and we wrote to a reference in Ash Grove, Missouri, asking if she could give us any information regarding Mr. Jennings. We had no reply, and wrote to a son in Springfield asking for information with regard to his father. This letter was returned unclaimed, so we wrote again to Mr. Jennings' daughter in Washington and have her reply of March 19 saying that her father has been trying to make arrangements to return to Missouri but is unable to come by bus or train and they have been trying to make arrangements for him to drive back. She states he does not care to make his home in Washington and asks if he will receive his back checks when he returns to Missouri.

"Will you kindly advise us as to whether or not Mr. Jennings is eligible to receive the back payments of the blind pension."

As your letter is understood, you wish to know the rules of law to be applied by the Commission for the Blind in determining whether or not the mentioned pensioner, James E. Jennings, has become ineligible to receive a blind pension.

In order for the Commission to pass on this question, it must apply one section of the statutes, Section 9451, R. S. Mo. 1939, which is in part as follows:

"Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the state of Missouri for ten consecutive years or more next preceding the time for making application for the

pension herein provided, and every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident of this state and who has been a continuous resident thereof since such loss of sight, shall be entitled to receive, when enrolled under the provision of this article, an annual pension as provided for therein, payable in equal quarterly installments: * * *

Attention is also directed to a portion of Section 9454, R. S. Mo. 1939:

"* * * And whenever it shall become known to the commission that any person whose name is on the blind pension roll is no longer qualified to receive a pension, after reasonable notice mailed to such person at his or her last known residence address, such fact shall be certified to the state auditor and the name of such person shall be stricken from the blind pension roll: * * *

The Missouri appellate courts have never defined the word "resident" as used in the Blind Pension Law. The word is one having many meanings, there are twenty-three pages of definitions in Words & Phrases, Permanent Edition. It is our belief the Legislature intended that only those persons, who, in good faith, had established their permanent residence or domicile in the State of Missouri, and intended to permanently, or at least for an indefinite time retain the residence established, could become eligible to receive a blind pension, or retain eligibility after it was once established.

A permanent residence is established by presence in the place, coupled with the intention of making that place the residence or domicile. If the intention is not present then the person does not establish a residence or domicile.

In determining the residence of a person, a court or other fact finding body should consider all evidence available, including the expressed intention of the person, giving to each bit of evidence such weight, under the circumstances, as it deems proper.

May 14, 1945

At this point it is desired to call attention to a quotation from the case of Firth v. Firth, 24 Atl. Rep. 916, 1. c. 918:

"The decision of questions of disputed domicile are frequently surrounded with a great many practical difficulties. The evidence is often obscure, equivocal, and contradictory. The acts or conduct of the person whose domicile is the subject of dispute will, in many cases, seem to indicate with certainty that his residence must have been in one place, while his declarations go to show that it was in another. * * *"

In this case the court held that the absence of over five years of the person from his original place of residence, showed an intention to establish a new residence in the place where he had been residing, even though he expressed the intention of retaining his original place of residence.

The same rule is stated by the court in the case of In re Lankford Estate, 272 Mo. 1, 1. c. 9:

"Residence is largely a matter of intention. (Lankford v. Gebhart, 130 Mo. 621.) This intention is to be deduced from the acts and utterances of the person whose residence is in issue. * * *"

Another quotation stating this rule is taken from Chomeau v. Roth, 72 S. W. (2d) 997, 1. c. 999:

"* * * In other words, mere physical presence at the school is not enough either to gain for him a voting residence at the school, or to cause him to lose his existing voting residence at his home; the whole question, as in all similar situations, being largely one of intention, to be determined not alone from the evidence of the party himself, but in the light of all the facts and circumstances of the case. Hall v. Schoonecke, 128 Mo. 661, 31 S. W. 97; Goben v. Murrell, 195 Mo. App. 104, 190 S. W. 986, 197 S. W. 432."

May 14, 1945

In each of these cases the court was determining the legal residence for the application of different laws. In the Firth case, for the purpose of determining jurisdiction of a court; in the Lankford case, for determining where administration should be had on an estate; and in the Chomeau case, to determine the right to vote. The court determining where the residence was established, the person was a resident of that place,

A voting residence may be acquired in the State of Washington by one year's residence, Constitution of Washington, Section 1, Article VI,

In the case for determination by the Commission, a pensioner left his place of residence in the State of Missouri, went to another state and has remained there over two years, a year longer than is necessary to establish a voting residence in the State. The pensioner declares his intention to return to Missouri at some indefinite time in the future.

CONCLUSION

The Commission for the Blind should consider all of the evidence it can procure and from this evidence determine, under the rule herein set out, whether or not the pensioner went to the State of Washington with the purpose of establishing a new residence or domicile. If, in the judgment of the Commission, that was his purpose, he is no longer eligible to receive the pension. If, however, the Commission should determine it was not his intention to establish a new place of residence and become a resident of the State of Washington, but merely to make a visit and has been unavoidably prevented from returning to Missouri, he would retain his eligibility to receive a pension.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CRIMINAL PROCEEDINGS:

Official court reporter not required to report preliminary hearings. Fee for such work should be 15¢ for 100 words.

September 27, 1945

FILED

46

Honorable Roy A. Jones
Prosecuting Attorney
Warrensburg, Missouri

Dear Sir:

Under date of September 17, 1945, you wrote the Attorney General making the following request for an opinion:

"In Re: Sec. 3870 R. S. Mo., 1939.

"The above Section provides that evidence in all cases of homicide shall be reduced to writing and signed by the witnesses respectively in connection with the preliminary examination. The statute does not state who will act as reporter, the amount of compensation to be paid, and who will pay the cost of same. In some counties of this state the official court reporter has been submitting his bill directly to the County Court for payment. Will you please advise me as follows:

"1. Is the official court reporter required to act in such cases as part of his official duties?

"In case he is not required to act, in some counties, it would be extremely difficult to get the work done at all. For example, in Johnson County there is not a reporter available who is competent to take the testimony in a murder case.

Sept. 27, 1945

"2. Is there any limitation on the amount of pay and expenses?"

"3. Must the bill for such services be made a part of the transcript of costs in the case or can this bill be paid by the County Court?"

The section of the statute referred to in your letter is Section 3870, R. S. Mo. 1939, which is as follows:

"In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

In connection with this section it is desired to call your attention to Section 3879, R. S. Mo. 1939, and the Supreme Court, in speaking of these two sections, in the case of State v. Banton, 342 Mo. 45, 111 S. W. (2d) 516, said the purpose of these sections was to secure a fair preliminary examination and the preservation of the testimony.

The official stenographer or reporter for the Circuit Court of the circuit is appointed under the provision of Section 13339, R. S. Mo. 1939, and the duties of this office are prescribed by Section 13340, R. S. Mo. 1939, which is as follows:

"It shall be the duty of the official court reporter so appointed to attend the sessions of the court, under the direction of the judge thereof; to take full stenographic notes of the oral evidence offered in every cause tried in said court, together with all objections to the admissibility of testimony, the rulings of the court thereon, and all exceptions taken to such rulings; to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said evidence or oral proceedings upon the payment to him of the fee hereinafter provided."

Sept. 27, 1945

You will note that there is no duty placed upon the reporter of the circuit court to take the evidence at the preliminary hearing in a homicide case. The statute requires the testimony to be taken by the magistrate or under his direction.

Section 3870, supra, does prescribe a fee which may be charged for the taking of the testimony in preliminary hearings where the defendant is charged with homicide. However, in Section 13400, R. S. Mo. 1939, which fixes the fees that may be charged by justices of the peace, is the following: "For writing depositions, when required to do so, for every 100 words15" Writing testimony in preliminary hearings is the same type of work as taking depositions. Further, by Section 13344, R. S. Mo. 1939, the fees of a stenographer or reporter for the circuit court are fixed at fifteen cents for one hundred words, each four figures to be counted as one word, for making transcripts of the testimony.

As the lawmakers have not definitely fixed the fee for taking testimony at preliminary hearings, it would seem reasonable that fifteen cents per hundred words, which has been fixed in two other statutes for this type of work, would be proper.

In regard to the matter of the liability for the fee of the person writing the evidence in the preliminary hearing in a homicide case, the liability for costs in criminal cases is fixed by statute. Sections 4221, 4222, 4223 and 4224, R. S. Mo. 1939. The party liable for the costs is determined by the result of the case, except in cases of conviction of an insolvent defendant, in which the costs, except those incurred by the defendant, are paid by the State or county according to whether the conviction was for a felony or a misdemeanor.

At this point it is considered pertinent to call attention to the recent case of Cramor v. Smith, Auditor, 168 S. W. (2d) 1039. This case involved an attempt to collect from the State the fees of the court reporter for making a transcript of the evidence in a criminal case to be used on an appeal by the insolvent defendant in accordance with the provisions of Section 13344, R. S. Mo. 1939, before the case had been finally determined. The court in ruling that the fee for this service could not be collected until a final determination of the case, spoke as follows at l. c. 1041:

"Referring to Section 4236, supra, it will be seen that it is the duty of the clerk to tax the costs and issue fee bills in criminal cases when the same 'shall have been determined or continued generally.' The verb determine 'has been variously defined, the three principal senses being to ascertain, to bound, and to terminate.' 26 C. J. S., Determine, pp. 1257, 1258. 'To put or set an end to; to bring to a close; to terminate.' (Webster's International Dict.) In *Hanchett Bond Co. v. Glone*, 208 Mo. App. 169, 232 S. W. 159, 160, it was said, 'The term "determination" may "properly, and according to legal use as well as according to its derivation, signify the coming to an end in any way whatever * * * more specifically the final result of a proceeding." 18 C.J. 983' (italics, the present writer's.) We hold the term 'determined' was used in Section 4236, in the sense of terminated, or brought to an end, finished (26 C. J. S., Determine, p. 1259)--and this not merely insofar as the trial court might have been presently concerned, but as implying a finality. As thus construed, this provision harmonizes with the scheme of the statute for the certification, allowance and payment of criminal costs through the medium of a 'complete' fee bill. Only items omitted by oversight or mistake of the clerk may be certified in a supplemental bill, for which supplemental bill the clerk is expressly denied compensation. Section 4244, R. S. 1939, Mo. R.S.A. Sec. 4244. The criminal costs statutes hereinabove set out do not contemplate that the costs in a particular case shall be paid in part by the county, and in part by the state. * * *

The item you inquire about is similar to the item under discussion by the court in the *Cramer* case, supra. It is

Sept. 27, 1945

an item of costs, the liability for which will be determined by the outcome of the case under the statutes applying to the payment of costs in criminal cases.

The fees of a stenographer for writing evidence before a justice of the peace in a preliminary hearing on a charge of homicide, could not by any stretch of the imagination be considered an obligation of the county, unless, upon final determination, the costs should be adjudged against the county. This item is solely a matter of costs in the case.

Conclusion

- (1) It is not the duty of the official stenographer or reporter of the circuit court to write the evidence presented to a justice of the peace in the preliminary hearing upon a charge of homicide. If the reporter wishes to accept such employment there is no law which would prevent him from doing so.
- (2) The fee should be fifteen cents per one hundred words.
- (3) The bill for such service is an item of the costs of the case and should not be paid by the county prior to the determination of the case.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WOJ:EG

21 Smith
COUNTY COURTS:

Regarding the legality of a county road bond issue submitted to the voters, under Section 8607, R.S. Mo. 1939; bond issue void.

October 1, 1945

10-3
FILED
46

Honorable Roy A. Jones
Prosecuting Attorney
Johnson County
Warrensburg, Missouri

Dear Mr. Jones:

This office is in receipt of your letters of August 21, 1945, and September 14, 1945.

In your letter of August 21, 1945, you requested an opinion of this Department as to the use of funds voted under a road bond issue, for the purpose of graveling the rural mail routes of Johnson County. In your letter of September 14, 1945, you further requested an opinion of this Department as to the legality of the election voting the bond issue.

As we read your letters, the first question to be determined is that regarding the legality of the proceedings by which the road bond issue was voted.

Section 8607, R.S. Mo. 1939, under which the election was held, reads as follows:

"Whenever a petition, signed by two hundred (200) or more taxpaying citizens of any county in this state shall be presented to the county court thereof, requesting that a proposition be submitted to the qualified voters of the county to issue the bonds of said county for the grading, construction, paving or maintaining of paved, gravelled, macadamized or rock roads and necessary bridges and culverts therein, it shall be the duty of said county court to order an election to be held in said county upon the question, which said election shall be held within forty-five

(45) days after making the order: Provided, that such election may be held on the day of any election at which candidates for state offices may be nominated or elected, provided said day is not more than forty-five (45) days after the making of said order. Said order and the notice of election shall state the amount of bonds to be issued and the date of the election, and that the proceeds of the bonds are to be used for the grading, construction, paving or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts in the county. The county clerk shall give notice of said election by causing the order providing for the election to be published once a week in four separate issues of each of two newspapers published in the county, the last insertion to be made prior to the date of said election. The election herein provided for shall be held in the same manner and at the same polling places that general elections are or may be held and no person shall be permitted to vote at such election who would not be qualified to vote at a general election were such an election held on that day. The ballots shall be printed at the expense of the county and distributed among the election precincts as in the case of general elections and shall be in substantially the following form, to-wit:

"OFFICIAL BALLOT.

"For incurring of county indebtedness for road and bridge purposes. Against incurring of county indebtedness for road and bridge purposes. (Erase the clause you do not favor.)"

"The result of such election shall be canvassed, determined and promulgated as in the case of general elections and shall be certified to the county court and recorded on the records thereof."

The provisions of the statutes providing for special elections are mandatory insofar as their provisions relating to the giving of the notice of the time and place of the election are concerned. The Missouri Courts have consistently

held that this matter of the giving of the notice is a jurisdictional matter, and without strict compliance therewith, the election is void.

Wood vs. City of St. Joseph, (1945, MO. App.),
186 S.W. (2d) 212;
State ex rel. Brince vs. Franklin, (1926) 283
S.W. 712, 220 Mo. App. 232;
Williams vs. Etterson, (1914) 170 S.W. 370, 178
Mo. App. 178;
Michel vs. Taylor, (1910) 127 S.W. 949, 143 Mo.
App. 683;
City of Brunswick vs. Benecke, (1921) 233 S.W.
169, 289 Mo. 307;
State vs. Johnson County Court, (1909) 138 Mo.
App. 427.

In Wood vs. City of St. Joseph, supra, the plaintiff sued to recover salary covering eleven and one-half months services, at the rate which he claimed he was entitled to receive in accordance with the wage increase voted by the people of St. Joseph, at a special election in 1942. The question in the case was the legality of the election, which in turn depended upon whether proper notice had been given to the voters. The Court held the election was void, and said:

"It is held, in this state, that where a special matter, such as the proposal in question, is submitted at a general election, so far as the submission of the special matter is concerned, it is to be treated as though it is being submitted at a special election and that the law authorizing its submission must be strictly followed; that the giving of notice to the public of the time and place of the election is 'jurisdictional', and that the election is void unless such notice is given strictly in accordance with the statute if the statute prescribes the method in which the notice should be given. (citing cases).

"As before stated, no effort was made to comply with either Section 6572, relative to the publication of the proposition, nor with Section 6253, concerning

notice, by publication, in two daily newspapers, of the mayor's proclamation calling for the election. The publishing of the proposition itself, is for the purpose of giving the widest publicity to the proposal. *Palmberg v. Kinney*, 65 Or. 220, 132 P. 538; *In re House Resolution No. 10*, 50 Colo. 71, 114 P. 293, 295.

"While Section 6572 provides that the ballot used in initiative elections shall contain merely the words 'For the Ordinance' (stating the nature of the proposed ordinance) and 'Against the Ordinance' (stating the nature of the proposed ordinance)' and the ballot, published and used in the election in question contains these words, yet, Section 6572 contemplates that, before the day of the election the ordinance or proposition be published, in full, in each of the daily newspapers, such publication to be not more than twenty or less than five days before the submission of such proposition or ordinance to be voted on. Evidently it was the purpose of the legislature to make provision for the voters to obtain full knowledge of the contents of the ordinance and to provide sufficient time for them to study the proposition so that they might cast an intelligent vote upon it. Under such circumstances when the voters go to the polls they have sufficient information as to the proposition to be voted upon so that it is merely necessary to have the ballot indicate whether an affirmative or negative vote is being cast by the voter. The few words appearing on the ballot, itself, are not intended to inform the voters as to the contents of the ordinance or proposition being voted upon.

"The publication, in this case, of

the ballot, if it can be construed as any notice of the election whatever (of course, it did not comply with the statute) was not published 7 days before the election, as required by Section 6253, but the first publication was 8 days before the election. In addition to this, the notice (if any) obtained from the ballot, was defective, in that, it would indicate that only those voting the Democratic or Republican ticket would be entitled to vote on proposed amendment to the ordinance. No instruction was given as to how one voting the Independent ticket could vote for or against the proposition. In fact, there was no instruction whatever relative to voting on the proposition. As to notice of the time and place of a special election, it was held in State ex rel. v. Ross et al., supra, 180 Mo. App. loc. cit. 693, 143 S.W. at page 505:

"To the general proposition that time and place are of the substance of an election we give our unqualified assent; and, if the statute in terms required the polling places to be designated in the order for the election, or the notice of the election, we should hold such a provision mandatory and an election held without this provision being complied with void. As we view it, the things upon which jurisdiction to hold such an election as this rests are a proper petition, an order for the election, and notice of the election. If all of these are in substantial compliance with the statute, then jurisdiction attaches, and up to this point all specific provisions of the statute should be held mandatory, and a substantial compliance with its terms required."

The above cases show that the provisions of Section 8607, supra, relating to the giving of the notice

October 1, 1945

of the election to the voters of Johnson County are mandatory, and must be strictly followed.

Section 8607, supra, provides that the County Clerk shall give the notice by causing the order providing for the election to be published once a week, in four separate issues of each of two newspapers published in the County.

From the affidavits of the publishers of The Warrensburg Standard-Herald, and the Warrensburg Star-Journal, which affidavits you forwarded to me in your letter of September 14, 1945, it appears that the notices of an election on the road bond issue were published on October 27, and November 3, 1944. We think the intention of the Legislature was that the notice should be given weekly, for four weeks. In this case, it is obvious that the notice was insufficient to meet the requirement of Section 8607, since October 27, 1944, fell on Friday of the last full week of October, 1944, and November 3, fell on the next Friday, the first week in November. Therefore, the notice could have been given only for two weeks instead of the required four. This is true of both newspapers.

If the statutes were construed to mean that notice was required to be given only in four separate issues of each of the two newspapers, the notice given in the instant situation would still not meet the requirements, since the affidavits show that only two insertions were made in both papers, one each on October 27 and November 3, 1944. Under either construction of the statute therefore, we think the notice was not given the required number of times. We notice that in the affidavit of The Star-Journal that the numeral four is inserted in the space left to designate the number of weeks in which a notice has been consecutively given. The list of insertions, however, show that it was given consecutively for only two weeks. We assume that the insertions set out are the only ones which were actually made, as the separate insertions would undoubtedly have been listed had they been made. However, even if there was an oversight in The Star-Journal's affidavit as to the number of insertions the statute would not have been complied with, since the affidavit of the Warrensburg Standard-Herald shows that the insertions in that paper were made only "from October 27, 1944 to November 3, 1944".

You very kindly forwarded us copies of the papers in which the notice was given, and we note that the notice was, in part, in the form of an official ballot. The notice in both papers read, in part, as follows:

"Submitting to the qualified voters
whether the County of Johnson shall

October 1, 1945

incur indebtedness and issue bonds in a sum not to exceed \$435,000.00 for the purpose of hardsurfacing, with crushed limestone Rock, all rural mail routes in said County not heretofore graveled or paved."

From the above, we think it is clear that the provision of Section 8607, which provides that the County Clerk shall publish the order of the County Court calling the election, is not complied with. From a comparison of the certified copy of the order of the County Court, and the notice published in the newspapers, it will be seen that the order of the County Court was not published.

We are, therefore, of the opinion that the election on the road bond issue was void in the two particulars set out above, namely; that the order of the County Court was not published as a notice, and that the notice was not published for the required number of times.

Since we think the election proceedings by which the rural road bond issue was voted were void, and the bonds issued under such authority would be invalid, we think it unnecessary to refer to the questions upon which you requested our opinion, regarding the use of money raised by such bond issues. If the bond issue is void, and no money could be lawfully expended under such bond issue, the question of how money raised by a valid bond issue could be used, becomes a moot question.

CONCLUSION.

It is, therefore, the opinion of this Department that the \$435,000.00 road bond issued, voted by the people of Johnson County to gravel the rural mail routes of said County, would be invalid, because the provisions of Section 8607, R.S. Mo. 1939, under which the election was held, were not complied with.

Respectfully submitted,

SMITH N. CROWE, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

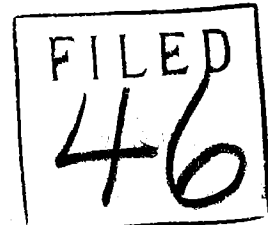
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OFFICERS: Employees of this State not prohibited by Article VII, Section 9 of the Constitution of 1945, from holding position of employment under the United States.

November 8, 1945

Opinion No. 46

Mrs. Lee Johnston
Executive Director
Missouri Commission for the Blind
Jefferson City, Missouri



Dear Madam:

Receipt is acknowledged of your letter dated October 29, 1945, in which you requested an official opinion of this office and which reads as follows:

"Will you kindly give me an opinion on the following question:

"At the time the army was planning its rehabilitation service for blinded war veterans the Surgeon General felt it wise to ask the executives of several blind commissions and the superintendents of several schools for the blind to advise him with regard to the type of training to be given to the veteran which would prepare them for work in their various states. Accordingly, an Honorary Civilian Advisory Committee was formed of which I was asked to be a member.

"At a recent meeting of this committee I was elected as one of three consultants to the Surgeon General. I find that there must be a Civil Service appointment to be a consultant and in addition to expenses the appointment pays a salary of \$25.00 per day. I was not sure whether this would conflict with Article 7, Section 9 of the new constitution and would like your opinion.

"This appointment is, of course, of a very temporary nature and will probably entail only one or two days further service before the termination of the work of this committee. I hope I have made it clear that none of the members of the committee get paid except the three consultants.

"Another question I would like to ask would be, whether, if this does conflict with the new constitution it would be possible for me to serve and refuse to accept the pay."

Article VII, Section 9 of the Constitution of 1945, provides as follows:

"No person holding an office of profit under the United States shall hold any office of profit in this state, members of the organized militia or of the reserve corps excepted."

(Emphasis ours.)

The above section prohibits only a person holding an office of profit under the United States who is presently holding an office of profit in this State. It does not prohibit an employee of this State from holding an office of profit under the United States, nor does it prohibit a person holding an office of profit in this State from being employed by the United States, and it does not prohibit an employee of this State from holding employment under the United States.

To determine if your being a consultant to the Surgeon General under civil service appointment conflicts with Article VII, Section 9, supra, we must first consider whether your present position of Executive Director for the Missouri Commission for the Blind is a public office and you, holding that position, are a public officer, or is such position employment and you, holding such position, are an employee of this State.

Chapter 53, Article 2, R.S.Mo. 1939, provides for the Missouri Commission for the Blind, the duties of the commission, etc. Section 9449 of this chapter provides as follows:

"Said commission may adopt bylaws or rules and regulations for its government; a majority of the commission shall constitute a quorum; it shall have power to appoint such agents and employees as it shall deem necessary and fix their compensation within the limits of the appropriation that shall be made by the general assembly; it shall hold regular monthly meetings, keep a full record of its proceedings and of its receipts and disbursements, and shall, on or before the first Monday in January of each biennial period, make a full report to the general assembly, presenting a concise review of the work of the commission for such period, with recommendations looking to the amelioration of the blind in this state."

(Emphasis ours.)

You will note that nowhere in this section, nor anywhere else in Chapter 53, is there created the office of Executive Director for the Missouri Commission for the Blind. Neither is there any section of the Constitution of 1945 creating such office. Section 9449, supra, only provides that the commission shall have the power to appoint such agents and employees as it shall deem necessary. In State ex rel. Pickett v. Truman, 64 S.W. (2d) 105, 1.c. 109, Judge Leedy said:

" * * * * It is perfectly apparent that 'employment' and 'agency' are distinguishable from public office; but the line of demarcation between them is sometimes difficult of perception. * * * *"

There is no hard and fast rule to apply in determining what constitutes a public office, but the facts in each case must be closely studied.

In Mechem, on Public Officers, page 1, the following definition appears:

"A public office is the right authority and duty, created and conferred by law, by which for a given

period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

This definition is in harmony with a great weight of authority and has been approved by the Supreme Court of this State in *State ex rel. Walker v. Bux*, 135 Mo. 325, 36 S.W. 636, 33 L.R.A. 616; *State ex rel. Zevely v. Hackmann*, 300 Mo. 59, 254 S.W. 53; *Hasting v. Jasper County*, 314 Mo. 144, 282 S.W. 700; *State ex rel. Pickett v. Truman*, 333 Mo. 1018, 64 S.W. (2d) 105; *State ex inf. McKittrick v. Whittle*, 333 Mo. 705, 63 S.W. (2d) 100.

The position of Executive Director of the Missouri Commission for the Blind is not created or conferred by law, as for example, the office of Director of Conservation is created in Article IV, Section 42 of the Constitution of 1945, or as the office of Probation Officer is created by Section 9681, R.S.Mo. 1939.

Another element of a public office is that the person holding such office is to perform some sovereign function of government. In the case of *State ex rel. Newman v. Skinner*, 93 A.L.R., 331, 1.c. 332, the distinction between "officer" and "employee" is treated in the following language:

"A public officer, as distinguished from an employee, must possess some sovereign functions of government to be exercised by him for the benefit of the public either of an executive, legislative, or judicial character. It is well stated in the *Landis Case*, supra, that 'the chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent political or governmental functions, then the position is a public office, and not an employment.' * * * *"

The duties which you perform in your present position are not conferred upon you by law. We believe that the members of the commission, having faith and confidence in your ability, have given you duties of a broad and general nature that allow you to exercise considerable discretion in their performance. However, we do not believe that their performance involves the exercise of continuing, independent political or governmental functions.

Again referring to the Truman case, supra, the court, in passing upon the question of what constitutes an employee or public officer, said at l.c. 106:

"Numerous criteria, such as (1) the giving of a bond for faithful performance of the service required, (2) definite duties imposed by law involving the exercise of some portion of the sovereign power, (3) continuing and permanent nature of the duties enjoined, and (4) right of successor to the powers, duties, and emoluments, have been resorted to in determining whether a person is an officer, although no single one is in every case conclusive. * * *"

Other denotations are given in the case of Gracey v. St. Louis, 213 Mo. 384, l.c. 394, as follows:

" * * * * His oath, his bond, his liability to be called to account as a public offender for misfeasance or non-feasance, the tenure of his position, etc., have been said to be indicia of a public officer. * * *"

We do not believe that any of the elements appearing in the above quotations attach to your present position of Executive Director of the Missouri Commission for the Blind. We believe that your present position is one of employment and not a public office of this State and you, holding such position, are an employee.

You state that the position to which you have been elected is consultant to the Surgeon General. The word "consultant" is not treated in the works of Corpus Juris or Words and Phrases,

two outstanding sources of information. However, Webster's New International Dictionary, Second Edition, defines the word "consultant" as follows:

"One who gives professional advice or services regarding matters in the field of his special knowledge or training, as a consulting physician or engineer."

Consequently, it appears that the position to which you have been elected, namely, consultant to the Surgeon General, is purely of an advisory nature and does not possess any of the elements herein discussed to qualify it as being a public office under the United States. Your holding such a position would not make you a public officer under the United States, but rather an employee of the United States.

We do not believe that your being elected as consultant to the Surgeon General under civil service appointment will conflict with the provisions of Article VII, Section 9 of the Constitution of 1945. Therefore, the question of your serving in that capacity and refusing to accept the pay will not be treated at this time.

Conclusion.

Therefore, it is the opinion of this office that: (1) Your present position as Executive Director for the Missouri Commission for the Blind is not a public office, but a position of employment in this State; (2) you, holding such position, are not a public officer, but an employee in this State; (3) the position of consultant to the Surgeon General is not a public office under the United States, and the one holding such position under civil service appointment is an employee of the United States and not a public officer; (4) you, as an employee of this State, are not prohibited by Article VII, Section 9 of the Constitution of 1945, from holding a position of employment with the United States under civil service appointment.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

BLIND PENSION: RE: Question of Qualification of an
applicant for Blind Pension

November 19, 1945



Missouri Commission for the Blind
Jefferson City, Missouri

Attention: Mrs. Lee Johnston
Executive Director

Gentlemen:

This will acknowledge receipt of your letter of
October 29, 1945, requesting an official opinion of
this Department, which letter reads as follows:

"We should like to have an opinion on
the question of residence of the follow-
ing case:

"A blind pensioner of Missouri advised
us on May 7, 1942, that she was no long-
er eligible for the blind pension because
she had moved to the State of Iowa where
her husband was working in a defense
plant. After investigation, her name
was removed from the blind pension rolls.

"She has now reapplied, stating that her
husband has brought her back to Missouri
and left her and her daughter without
means of support but that up to this time
she has not secured a divorce.

"All of our records show that her Missouri
residence dates back to March, 1927.

"Thank you very much for your opinion
as to the point of eligibility under the
residence clause."

Qualifications for a blind pension in the State of
Missouri are set forth in Section 9451, as amended, page
786, Laws 1943, which provides that to be eligible for
said pension one must have been a resident of this State

Missouri Commission for the Blind

Nov. 19, 1945

for ten (10) consecutive years or more next preceding the time of making application. Further, one cannot qualify who is living with a sighted husband or wife who has income or is the recipient of \$900.00 or more per annum from any source. Section 9451 reads, in part, as follows:

"Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the state of Missouri for ten consecutive years or more next preceding the time for making application for pension herein provided, * * shall be entitled to receive, when enrolled under the provision of this article, an annual pension as provided for therein, payable in equal quarterly installments: Provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of nine hundred (\$900.00) dollars or more per annum from any source whatever, or who owns property, or has an interest in property to the value of five thousand (\$5,000.00) dollars or more, or who lives with a sighted husband or wife who has an income or is the recipient of nine hundred (\$900.00) dollars or more per annum from any source whatever or * * *".

Supplementing your request of October 29, 1945, we deemed it necessary to have additional facts, and upon request you forwarded to the writer your file in the case. Upon an examination of the contents of said file we find that the applicant's husband was receiving more than \$900.00 per annum while employed at the Burlington Ordinance Plant in the State of Iowa. He received \$5.60 per day, and was permitted to work only five days per week. That the applicant, in a letter to the Blind Commission, stated that she had been informed that she was no longer eligible for a blind pension, and that she should let the Commission know that she intended to move with her husband out of the State of Missouri. Upon receipt of this information the Blind Commission wrote the applicant requesting additional information, informing her that all this information would have a bearing upon her eligibility

Missouri Commission for the Blind

Nov. 19, 1945

if, at any time, she wished to return to the State of Missouri. That it was the understanding of the Blind Commission that she was going to the State of Iowa for temporary defense work, and that her name would not be removed from the blind pension rolls until they knew more about it. The applicant replied to said letter informing the Commission that her husband was working in Iowa, giving the amount of money he was making, however, the company was discharging men right along and they were not sure of his job; that they were living in Burlington in a government housing project, and that she supposed it would be called temporary for she did not know when he would be laid off. We assume from the correspondence found in the file, that the applicant was prompted to write the Blind Commission and inform them that she was no longer eligible, by reason of a visit made on May 2, 1942, by an employee of the Blind Commission. Thereafter, on June 11, 1942, the Blind Commission informed her that her name would be stricken from the rolls and should she, at any time, be in need of a blind pension and eligible under the law she could file another application, and an examination and investigation would be given. On the same date, the Blind Commission wrote Forrest Smith, State Auditor, that the Commission had been advised by the applicant that her husband was now working in a defense plant in Iowa, and that she was therefore ineligible for a blind pension, and requested him to strike her name from the rolls. Thereafter, on October 26, 1942, the Blind Commission also notified the Probate Court of Schuyler County, Missouri, that the applicant's name was stricken from the roll, for the reason that she is now living in Iowa where her husband is working in a defense plant, and is earning more than the limit fixed by the Blind Pension Law. On the same date the Blind Commission wrote Forrest Smith, State Auditor, informing him that the applicant's name was stricken from the roll at a meeting by the Commission for the Blind, for the reason the husband was working in a defense plant, and that she moved to Iowa and was ineligible. The one and only specific mention of the fact that the applicant had taken up residence somewhere else, and that being the ground for disqualifying her, was mentioned in a letter of October 20, 1942, from the Blind Commission to the applicant informing her that at a meeting of the Commission on October 20, 1942, her name was stricken because she had taken up residence in Iowa, and that her husband was earning more than allowed by the blind pension law.

Under the foregoing facts, the applicant was not

Missouri Commission for the Blind

Nov. 19, 1945

qualified to receive a blind pension so long as she lived with her sighted husband who was receiving an annual salary of \$900.00 or more, and there can be no question but that while she was living with her husband in Iowa, and he was employed and earning \$900.00 or more, subsequent to her removal from the roll, she was not eligible for a blind pension. Furthermore, we believe that the applicant intended to take up a temporary abode in Iowa with her husband for so long as he held his position in the Burlington Ordinance Plant, which under the facts, might be terminated at any time.

The question now boils down to one or two things. First, did this applicant lose her residence in Missouri by moving with her husband when he became employed at the defense plant in the State of Iowa? If so, she has not been a resident in this State, as required in Section 9451, supra, stating that one must have been a resident of Missouri for ten consecutive years or more next preceding the application for a blind pension. If this question is answered in the negative, and assuming her husband is still the recipient of \$900.00 per annum, under such facts stated in your letter, would the applicant be considered living with her husband as provided in Section 9451, supra? If so, then she is disqualified to receive a blind pension, and if not, she is eligible for same.

It is a well established rule of statutory construction that statutes should receive a sensible construction such as will affect the Legislative intent and, if possible, so as to avoid an unjust or absurd conclusion.

In *Fishbach Brewing Co. v. City of St. Louis*, 95 S.W. (2d) 335, 231 Mo. App. 793, l.c. 339, the court said:

"* * * A cardinal rule of statutory construction is to give effect to the legislative intent, where ascertainable; another is to favor such a construction which would tend to avoid injustice, oppression, and absurd and confiscatory results and be in harmony with the rule of reason * * * ."

The word "resident" is very flexible and hard to define for all purposes. It depends upon the connection in which the word is used, and the facts and circumstances taken together in each particular case.

Missouri Commission for the Blind

Nov. 19, 1945

For example the word resident as used in the statute governing the qualifications of a voter might be construed very differently from the word as used in a divorce or pension statute, or in a statute pertaining to the qualifications of an office holder. In 54 C.J., Sec. 1, page 712, we find the following statement of law defining residence which reads as follows:

"RESIDENT. (Sec. 1) A. In General. Although there are many definitions to be found in the books, it is not easy to give a satisfactory definition of this term, for it is a flexible, somewhat ambiguous word, used in many and various senses, with the sense in which it should be used controlled by reference to the object, thus having different meanings according to the context, or the subject matter under discussion. It has a great variety of meanings. It is difficult to give an exact definition of what is meant by 'resident' as used in particular statutes, for, although often construed by the courts, the term has no technical meaning, but is differently construed in courts of justice, according to the purposes for which inquiry is made into the meaning of the term. The construction is generally governed by the connection in which the word is used, and the meaning is to be determined from the facts and circumstances taken together in each particular case."

Section 655, R.S. Mo. 1939, defines residence as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: * * *
* * * seventeenth, the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively; * * *".

In, Petition of McLaughlan, in Re Hersey, 1 Fed. (2d) 5, l.c. 7, the court quoted approvingly from Jenkins in Re

Missouri Commission for the Blind

Nov. 19, 1945

Garneau, 127 Fed. 677, 679; 62 C.C.A. 403, 405, and said:

"Residence has been defined to be a place where a person's habitation is fixed, without any present intention of removing therefrom. It is lost by leaving the place where one has acquired a permanent home and removing to another place animo non revertendi, and is gained by remaining in such new place animo manendi. * * * The term is an elastic one, and difficult of precise definition. The sense in which it should be used is controlled by reference to the object. Its meaning is dependent upon the circumstances then surrounding the person, upon the character of the work to be performed, upon whether he has a family or a home in another place, and largely upon his present intention."

It has been held that once a residence has been established a mere temporary absence from the state with the intention of returning does not break the continuity of a residence, 48 C.J. Sec. 91, page 471, reads, in part, as follows:

"* * * But where a residence has once been established by the concurrence of intention and personal presence, continuous personal presence thereafter is not essential to a continuous residence, especially when he whose residence is in question has a family between whom and him mutual family relations are in full force."

In *Bradshaw v. Bradshaw*, 166 S.W. (2d) 805, 1.c. 806 and 807, the court, in holding that residence depended largely upon intention, said:

"(2-4) 'Residence' or 'legal residence' frequently used in the same sense, is largely a matter of intention coupled with an act or acts in conformity thereto; and a change of residence also depends largely on the intention to abandon the one and acquire the other. 28 C.J.S.

Domicile, Sec. 11, p. 15; Trigg v. Trigg, 226 Mo. App. 284, 41 S. W. 2d 583; Nolker v. Nolker, Mo. Sup. 257 S. W. 798; Finley v. Finley, Mo. App. 6 S. W. 2d 1006; Wyrick v. Wyrick, 162 Mo. App. 723, 145 S. W. 144. A person's legal residence and actual residence may be different. 17 Am. Jur. Sec. 11, page 596.

"It is obvious that the plaintiff in the instant case had a legal residence in Laclede County, Missouri when he left there in 1937. There is no evidence that he left with the intention to remain away, either permanently or for an indefinite time; or that he left without any fixed or certain purpose to return to his former place of abode. Absent any proof of these elements defendant fails to establish her allegations in the Plea in Abatement. As indicated in the beginning she only used one witness, the plaintiff. Her theory must have been based on the Biblical admonition, ' * * * by thy words thou shalt be condemned.' " (Math. 12:37)

In Finnley v. Finnley, 6 S.W. (2d) 1006, l.c. 1006 and 1007, the court said:

"(1,2) The question of residence is a question of intention, and our Supreme Court has held that actual residence and the intention to remain, either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode, are sufficient to constitute a change of domicile or residence. The length of time is immaterial if these elements are present. An hour is sufficient for the acquisition of a domicile. Nolker v. Nolker (Mo. Sup.) 257, S. W. 798."

" * * * The question of residence being a question of intention, she had a right to take up her residence at Cape Girardeau if she so desired, and it was not necessary that she stay there for any definite length of time in order to establish that as her residence. * * *"

Missouri Commission for the Blind

Nov. 19, 1945

Since this applicant has been a resident of the State of Missouri since 1927, and was even a recipient of a blind pension in the State of Missouri until at her own request she was removed from the roll, we believe that under the facts stated in your request, and those we discovered from an examination of the papers in the file of the Commission for the Blind in this case, that said applicant merely left the State of Missouri for the purpose of being with her husband while employed at the defense plant for the duration of the war and that she had no intention of discontinuing her residence in the State of Missouri, but fully intended to return to this State and take up her permanent residence upon the termination of her husband's employment in Iowa.

We are now confronted with the question, is said applicant while now residing in the State of Missouri living with her husband, as provided in Section 9451, supra? We are inclined to be of the opinion that she is not living with her husband, in view of the following decisions defining the words "living with." In *Weeks v. Behrend*, 135 Fed. Rep. (2d) 258, 1.c. 259, 260, the court defined "living with" as follows:

"(4-6) Appellant contends that the court should have remanded the case to the Deputy Commissioner for a possible finding either that appellant was 'dependent for support' upon her husband or that she was 'living with' him. It is a sufficient answer to say that the evidence would not have supported either finding. Appellant's husband made no regular contributions to her support. Though partial dependency will sustain an award of compensation, occasional contributions will not sustain a finding of partial dependency unless they are 'necessary and relied on.' There is no evidence that the contributions of appellant's husband were either necessary or relied on. There is strong evidence to the contrary; for appellant testified, in effect, that she earned a modest living by running the rooming house which she and her brother owned, while her husband was on relief."

In *McPadden v. Morris*, 13 Atl. (2d) 679, 1.c. 680 and 681, 126 Conn. 654, the court construed the words "living with him" in a statute providing pensions for widows of members of the police department as follows:

Missouri Commission for the Blind

Nov. 19, 1945

"(4) The language of the charter is clear and direct. The definition accorded to the word 'widow' expressly places a limitation for the class of surviving spouses who may qualify as beneficiaries of the pension plan. It excludes all those who are not living with their husbands at the time of his death. To live with another means to dwell, to reside, to make one's abiding place or home with that other. The phrase may also mean to cohabit. Webster's International Dictionary.

"I accept the definition found in Nelson's Case, 217 Mass. 467, 469, 105 N.E. 357, 358, as most in accord with sound legal logic. "With whom she lives" * * * means living together as husband and wife in the ordinary acceptation and significance of these words in common understanding. They mean maintaining a home and living together in the same household, or actually cohabiting under conditions which would be regarded as constituting a family relation. There may be temporary absences and incidental interruptions arising out of changes in the house or town of residence, or out of travel for business or pleasure. * * * The matrimonial abode may be a roof of their own, a hired tenement, a boarding house, a rented room or even a room in the house of a relative or a friend, however humble or temporary it may be. But there must be a home and a life in it.' And in Gallagher's Case, 219 Mass. 140, 106 N.E. 558, it was held that living together does not embrace those instances where a wife is justified in law in leaving her husband or where she is actually living apart from him, although this may be due to no fault of her own.

"If the Legislature had intended by the language it used to include those widows who were separated from their husbands with cause, it could easily have added language to that effect as it did when enacting Sec. 5156 of the General Statutes,

which is concerned with the statutory share of the survivor in the estate of the deceased spouse. That section, it will be recalled, provides that such survivor shall not be entitled to the statutory share who, without sufficient cause, has abandoned the other and continued that status to the time of the spouse's death.

"The plaintiff does not fall within the definition of a widow as the Legislature expressed itself. She was, in fact, living apart from him, in a different house in another section of the city. There is no room for interpretation. Inclined though one may be to warp the statute to meet his sympathies and to obtain an objective of less harsh character, such considerations must bow before the statutory mandate. The General Assembly has spoken and the law must be enforced as it was enacted. Under the circumstances, with real regret, I conclude that the plaintiff is not entitled to receive the benefits of the pension."

(See also In re: Gorski, 116 N. E. 811, 813, (6,7,8) 227 Mass. 456.)

Under the foregoing facts it is apparent that it was the intention of the applicant, at the time she moved to the State of Iowa, to be with her husband who was employed at the Burlington Ordinance Plant, and that she was only temporarily leaving the State of Missouri with the full intention of returning to the State of Missouri and continuing her residence in this State. That is shown by her letter in which she informed the Commission that she guessed it was merely a temporary position that her husband had taken in Iowa; also in the letter of the Commission advising her that if at any time she was in need of a blind pension and could qualify under the Laws of Missouri she could again file an application and an examination would be made; and in the letter to the State Auditor and to the Probate Court of Schuyler County, Missouri, from the Commission for the Blind, informing them that the applicant's name should be stricken from the roll for the reason that

Missouri Commission for the Blind

Nov. 19, 1945

she had moved to Iowa with her husband and he was employed and receiving \$900.00 or more per annum.

In view of the foregoing decisions defining the phrase "living with," we are of the opinion that this applicant, under the facts stated, is no longer living with her husband, as that phrase is used in the Blind Pension Law.

CONCLUSION

Therefore, it is the opinion of this department that this applicant, while with her husband in the State of Iowa, was only temporarily away from the State of Missouri with the full intention of returning to this State upon the termination of her husband's employment in the Burlington Ordinance Plant in the State of Iowa, and that, under the facts and authorities defining "living with," she is not at the present time living with her sighted husband and is entitled to receive a blind pension if she can otherwise qualify under the Blind Pension Law of the State of Missouri.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

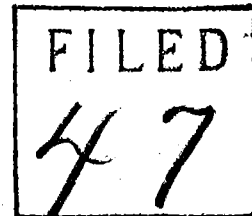
APPROVED:

W. O. JACKSON
(Acting) Attorney General

ARH:mw

SPECIAL ROAD DISTRICTS: Right to receive funds arising from taxes levied on property within the boundaries of special road districts organized under the provisions of Art. 11, Chap. 46, R. S. Mo. 1939, in the year of incorporation and organization.

March 20, 1945



Honorable O. A. Kamp
Prosecuting Attorney
Montgomery City, Missouri

Dear Sir:

Reference is made to your letter under date of March 5, 1945, requesting an official opinion of this office, and reading as follows:

"I am writing you for an opinion on the following question, which has come up with our County Court, and we would like a ruling from your department.

"A Special Road District was organized in this County by the order of the County Court, on December 4th, 1944, known and designated as the Rhineland Best Bottom Special Road District, under and in accordance with the provisions of Article 11, Sections 8710 and 8711, R. S. Missouri 1939. Three Commissioners were appointed by the Court who served until replaced at the election held on the first Tuesday after the first Monday of January 1945, in accordance with section 8712.

"The County Court had made the regular levy for the raising of revenue for road and bridge purposes at the May Term of said Court, 1944, in accordance with Sections 8527 and 8821, R. S. 1939.

"The territory from which this new Special Road District was organized, had been included in what is known as Montgomery County Road

March 20, 1945

District No. 1, which includes all of Montgomery County, which is not within the boundaries of Special Road Districts. The County had maintained and repaired the roads of said Montgomery County District No. 1, out of the revenue raised and anticipated for the year 1944, and the records show that money had been expended by the County out of said funds for the repair and maintenance of the roads and bridges in the territory now comprised by the new Special Road District, equal (OR MORE) to the amount of revenue raised on the valuation of said district as organized.

"The Commissioners of said district now are asking that the County Court set over and deliver to the district as now organized and to the Treasurer for their benefit, an amount of money equal to the revenue raised on the valuation of their district. The Court feels that since the district was not organized when the levy was made, last May, 1944, and due to the fact that they have expended on the roads and bridges in said district funds raised by said levy, that they cannot now set over to said district the funds they are asking for. They feel that this cannot be done under the law, and furthermore that the district has already had the benefit of said funds raised by said levy, through the expenditures made by the County Court during the year 1944, and that they will have to receive their funds from the levy to be made at the May Term, 1945, by the Court and such levy as the district Commissioners might levy under sections 8716."

We have carefully examined the statutes relating to the incorporation of special road districts of the type to which you refer, and we fail to find any direct answer to your question. However, it is a primary rule of statutory construction that the intent of the Legislature in enacting a law be ascertained and effect given thereto if possible.

March 20, 1945

As bearing upon the question of legislative intent in the matter at hand, we think portions of certain other statutes enacted at the same time as the one providing for the incorporation of such road districts as that to which you refer are pertinent. We quote, in part, from Section 8711, R. S. Mo. 1939, as amended, Laws of 1941, page 529:

" * * * Whenever an order is so made incorporating a public road district such district shall thereupon become, by the name mentioned in such order, a political subdivision of the state for governmental purposes with all the powers mentioned in this section and such others as may be conferred by law."

Also, from Section 8712, R. S. Mo. 1939:

"At the term of court in which such order is made, * * * the court shall appoint three commissioners, * * * who shall hold their office until the first Tuesday after the first Monday in January thereafter; * * *."

And from Section 8714, R. S. Mo. 1939:

" * * * Said commissioners * * * shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work: * * * "

In our opinion, the quoted provisions clearly indicate an intent on the part of the Legislature that such newly organized special road districts forthwith enter upon the discharge of the

March 20, 1945

duties enjoined upon them. As corollary to that proposition, we are of the further opinion that inasmuch as such duties are to be promptly discharged, the special road districts are necessarily to be empowered to do so by receiving, among other things, tax money to work with.

Applied to your particular case, it seems that the new special road district is entitled to receive such portion of the tax money arising from the 1944 levy on property within the boundaries of the new special road district that remains unexpended in the county treasury.

We have further noted your statement that more money has been expended on the roads and bridges located within the boundaries of the new special road district than was yielded by the levy on property located therein. If this fact be so established by the records, we feel that the commissioners of the new special road district are not entitled to receive any additional tax moneys.

CONCLUSION

In the premises, we are of the opinion that upon the incorporation of a special road district, under the provisions of Article 11, Chapter 46, R. S. Mo. 1939, such new district is entitled, upon organization, to receive all unexpended funds in the hands of the county treasurer arising from tax levies made upon property located within such new district; and that if prior to the organization of such new special road district the county court has in fact expended on the roads and bridges located therein more money than has been yielded by the levy on property located within such new special road district, that the commissioners thereof are not entitled to receive any additional funds from the county treasury in the year of organization.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

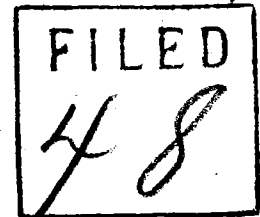
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

COUNTY COURTS: Cannot require licenses and assess taxes
Pinball Machines thereon unless empowered to do so by statute.

June 1, 1945



Honorable H. A. Kelso
Prosecuting Attorney
Vernon County
Nevada, Missouri

6/5

Dear Sir:

We acknowledge receipt of your request for an official opinion from this department. Your letter reads:

"In my official capacity as prosecuting attorney of Vernon County, Missouri, and at the request of the Vernon County Court I would like an opinion from your office on the following set of facts:

"In Vernon County, Missouri, there are a number of so-called pin-ball machines operating. They are not used for gambling but for amusement only. Could these machines be taxed by the County under our present law?"

We assume, for purposes of this opinion, that your conclusion is correct that the so-called pinball machines are not used for gambling but for amusement only. Also we are assuming that you mean, could these machines be licensed by the county under our present law.

Of course, these so-called pinball machines are subject to assessment and levy of personal taxes as are any other articles of personal property. But, if the county court had any authority to license such pinball machines that authority would, necessarily, have to be granted by the Legislature in some statutory enactment. Section 15397, R. S. Mo. 1939, empowers the county court to license certain tables, and provides as follows:

June 1, 1945

"The county court shall have power to license the keepers of billiard tables, pigeonhole tables, jenny lind tables, and all other tables kept and used for gaming, upon which balls and cues are used. At each term, the clerk of said court shall prepare and deliver to the collector of their counties as many blank licenses for the keepers of such tables, hereinbefore mentioned, as the respective courts shall direct, which shall be signed by the clerk and attested by the seal of the court."

(Emphasis ours.)

Obviously the power to license under this section does not extend so as to include the description of pin-ball machines.

Quoting from *Lancaster v. County of Atchison*, 180 S. W. (2d) 706, 1. c. 708, and other authorities quoted therein:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void." *Sturgeon v. Hampton*, 88 Mo. 203, loc. cit. 213. Quoted with approval in the case of *Morris et al. v. Karr et al.*, 342 Mo. 179, 114 S. W. 2d 962, loc. cit. 964.

"Both parties to this suit agree that counties, like other public corporations, 'can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the

June 1, 1945

corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' Dillon on Municipal Corporations, 3rd Ed., Section 89. We have repeatedly approved this quotation. See State ex rel. City of Blue Springs v. McWilliams et al., 335 Mo. 816, 74 S. W. 2d 363; State ex rel. City of Hannibal v. Smith, State Auditor, 335 Mo. 825, 75 S. W. 2d 367, 372."

In 1873 when the General Assembly first enacted the section, which is now 15397, supra, a county court sought to license certain tables mentioned in said section, after its passage by the General Assembly and before it had become a law. The case was appealed to the Missouri Supreme Court, Neef v. Maguire, 52 Mo. 493, and the court held:

"* * * The order of the County Court, therefore, made before the taking effect of the law under which it was attempted to be made, attempting to levy a tax or license on pigeon hole table, etc., was wholly without authority and void, * * * * *

Conclusion

Therefore, it is the opinion of this department, in the absence of a statute empowering the county courts to license the machines mentioned in your request, that any license or tax assessed therefor would be null and void.

Respectfully submitted,

APPROVED:

A. V. OWSLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

AVO:CP

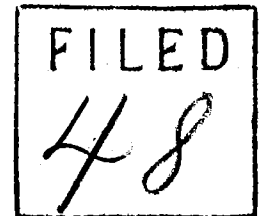
CRIMINAL LAW:

CONSERVATION COMMISSION:

Section 8967, R. S. Mo. 1939,
fixes a penalty for the violation
of rules and regulations adopted
and promulgated by the Conservation
Commission.

July 17, 1945

7/21



Honorable John H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
official opinion under date of June 26, 1945, which reads:

"A conservation agent informs me
that he has evidence a person took
game fish from a small stream in this
county on the 24th inst. by means of
a gig, in violation he claims of Sec-
tion 61, of the Wildlife-Forestry Code
of the State of Missouri, prepared by
the Conservation Commission prior to
the adoption of the new constitution
last February.

"This Section referred to fixes no
penalty. What would be the penalty?

"In view of the provisions of Section
31, of the Bill of Rights of the new
constitution, has the Conservation Com-
mission the power to promulgate rules
and regulations fixing penalties for
their violation?

"Sec. 31 of the Bill of Rights pro-
vides:

"That no law shall delegate to any
commission, bureau, board or other ad-
ministrative agency authority to make
any rule fixing a fine or imprisonment

July 17, 1945

as punishment for its violation.'

"Let me have your opinion, please."

Section 16, Article XIV of the old Constitution, now Sections 40 to 46, inclusive, Article IV, pages 36 and 37 of the new Constitution, vests in the Conservation Commission the authority to control, manage, restore, conserve and regulate all wildlife resources in this state. Section 40 reads in part:

"The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission consisting of four members appointed by the governor, not more than two of whom shall be of the same political party. * * *"

Section 31, Article I of the Bill of Rights under the new Constitution, page 18, provides that no bureau, board or other administrative agency shall have authority to fix a penalty for the violation of its rules. Said section reads:

"That no law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation."

We are of the opinion that the foregoing provision under the Bill of Rights in the new Constitution was not necessary, for the reason that prior to its adoption the law was well established that the Legislature could not delegate its authority to fix a penalty provision for the violation of any law, rule or regulation. In Volume 12 C. J., Section 338, page 352, we find the following principle of law:

"As a general rule, the legislature may not delegate to a commission the power to prescribe a penalty. It may, however, authorize a railroad commission to prescribe duties on which a statute imposing a penalty may operate; * * *"

July 17, 1945

Also see Section 333 of the same volume, page 848, which reads:

"It is the function of the legislature, as a part of its police power, to make laws for the protection of the public health, and this power may not be delegated to an officer or board. The legislature, however, having enacted such laws in general terms, may confer on a board of health the duty of enforcing them, and to that end may give it authority to make reasonable rules and regulations which shall have the effect of law. The board may not itself prescribe a penalty for the violation of its regulations, but it is competent for the legislature to prescribe a penalty for the violation of rules and regulations thereafter made by the board."

In State of Florida v. Atlantic Coast Line Railway Company, 32 L. R. A., New Series, 639, l.c. 660, the court said:

"Under the Constitution the legislature may confer upon the railroad commission judicial powers, but not exclusively or purely legislative powers. The power to prescribe penalties to be incurred for breaches of public duty appertains to the legislative department, to be exercised by the enactment of laws. It may not be proper for the legislature to delegate the power to make a law prescribing a penalty, but it is competent for the legislature to authorize the commission to prescribe duties upon which the law may operate in imposing a penalty and in effectuating the purpose designed in enacting the statute. * * * *"

In view of Section 31, supra, there can be no doubt that the Legislature is prohibited from delegating to the Conservation Commission, or any other agency, the power to impose a fine or imprisonment for violation of a rule adopted by it. However, the Conservation Commission does have authority to promulgate reasonable regulations for the control and regulation of wildlife.

July 17, 1945

No statute has been enacted fixing a penalty for the violation of rules and regulations subsequent to the adoption of the constitutional amendment creating the Conservation Commission. However, Section 8967, R. S. Mo. 1939, fixes a penalty for violation of any act prohibited by the Fish and Game Laws of the State of Missouri when no penalty is otherwise specifically provided. Said section reads:

"Any person violating any of the acts prohibited by the fish and game laws of the State of Missouri, a penalty for which is not otherwise specifically provided, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished in the same manner as provided for other acts of misdemeanor under the laws of this state."

The court, in the case of Marsh v. Bartlett, 121 S. W. (2d) 737, 1.c. 745, held that the above section applies to all reasonable rules and regulations promulgated by the Commission. In so holding the court said:

"The game and fish code, to which reference has been made, comprises more than one hundred sections. It is probable that among them, sections may be found here and there which were not inconsistent and not so repealed, and doubtless other sections that, with slight change, might readily be re-enacted. But that is not of present concern. However, on casual examination we find a penalty section that obviously has not been repealed. It is section 8311, R. S. 1929, Mo. St. Ann. Sec. 8311, p. 4113, reading as follows: 'Any person violating any of the acts prohibited by the fish and game laws of the state of Missouri, a penalty for which is not otherwise specifically provided, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished in the same manner as provided for other acts of misdemeanor under the laws of this state.'

"It therefore follows that penalizing and general section 8311 appropriately operates upon all violations of reasonable rules and regulations established by the Conservation Commission concerning the matters committed to it by said Amendment No. 4. * * * * *

Honorable John H. Keith

-5-

July 17, 1945

Therefore, in view of the foregoing authorities holding the Legislature is the only body that can fix punishment for violation of laws and rules and regulations, and also that Section 31, Bill of Rights of the new Constitution, does not in any manner change this authority, it is the opinion of this department that Section 2967, R. S. 1939 (same as Section 8311, R. S. 1929), fixes a penalty for the violation of reasonable rules and regulations promulgated and adopted by the Conservation Commission of the State of Missouri.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARN:ml

COUNTY LIBRARY DISTRICTS:

District should not include territory of a school district supporting a public library by school taxes. Manner and time of conducting election on library proposition and qualification of voters.

February 1, 1945

2/2
FILED

49

Honorable J. Marcus Kirtley
Assistant County Counselor
Hill Building
Independence, Missouri

Dear Sir:

This department acknowledges receipt of your letter of recent date, directed to the Office of the Attorney General, in which you requested an opinion on the County Library Districts Law, Sections 14767 - 14776, R.S. Mo. 1939, relative to the creation of a County Library District in Jackson County, Missouri. You state that:

"The Kansas City, Missouri School District embraces considerable territory outside the corporate limits of Kansas City. The Kansas City, Missouri Board of Education maintains a public library supported by the school taxes. Do those people residing in said school district outside the city limits of Kansas City have the right to vote on the library proposition and to be included in the district. In other words, are the people residing in said district and outside the limits of Kansas City already supporting a public library supported by taxation, or does the statute contemplate to be so excluded there must be a direct library tax?

"Section 14767 provides that said proposition shall be submitted to the voters at the annual election to be held on the first Tuesday in April and provides for voting in district school houses. The only election to be held in April in this

County is the annual school election as provided by Section 10418 R.S. Mo. 1939 and Section 10469 R.S. Mo. 1939. The specific questions that I have on this matter are as follows:

"May the library proposition be submitted to the voters at the school elections, or must it be voted on in every precinct in the territory affected by reason of imposing an increase in the tax levy? If voted on in school districts, what officials conduct the election and during what hours of the day; is it limited to certain hours during the day, or must the polls be open all day, and are the officials who conduct it to be designated by the persons constituting the voters assembled at the annual meeting or separate officials designated for the purpose of conducting the election? If the latter is the case, who appoints said officials?

"3. Section 14767 refers to qualified voters in the district. What are the qualifications for voters presenting themselves and offering to vote on such proposition?

"4. Jackson County, Missouri, in the territory to be embraced in said district, is under the jurisdiction of the Jackson County Election Board, as provided by Section 11851, and subsequent Statutes, R. S. Mo. 1939. Are the duties imposed upon the County Clerk under Section 14767 reserved to the County Clerk, or are they conferred on the Election Board, and, if separate officials are necessary to officiate at the election, are they under the supervision of the County Clerk or the Election Board?"

We assume that the Kansas City, Missouri Board of Education public library was created under the provisions of Section 10695, R.S. Mo. 1939.

Section 14767 of the County Library Districts Law provides:

"Whenever one hundred (100) taxpaying citizens of any county, outside of the territory of all cities and towns now or hereafter maintaining, at least in part by taxation, a public library, shall in writing petition the county court, asking that a county library district of the county, outside of the territory of all such aforesaid cities and towns, be established and be known as '_____ county library district',
* * *

Said section contemplates that the County Library Districts Law shall not apply to cities and towns maintaining a public library by taxation. We believe the fact that the public library there maintained is supported by school taxes and not by a direct library tax should not change the application of the exception in this Statute.

Section 3 of Article X of the Constitution of Missouri, provides:

"Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

The people residing in said Kansas City, Missouri School District and outside the limits of Kansas City, are already supporting a public library supported by taxation, and should not be included in the new proposed library district in order that the procedure might not raise the question of the validity of the tax in view of Section 3 of Article X of the Constitution. Cooley on Taxation, Volume I, fourth edition, Section 225, states:

"Some State Constitutions expressly prohibit double taxation. Others require equality and uniformity in taxation and uniformity in taxation and double taxation are wholly inconsistent."

In the case of State ex rel. Pearson, Collector, vs. Louisiana & Missouri River Railroad Company and Chicago & Alton

Railway Company, 196 Mo. page 523, 94 S.W. 279, the Court held that double taxation on the same property is not favored and is never presumed. Especially should this rule prevail, both as to legislative acts and in their application, where the Constitution contains an express provision requiring equality and uniformity in the imposition of taxes upon property. And where there is such a constitutional provision, as there is in this State, it will not be held that property, liable to be taxed under one provision of the statutes, was intended to be subject to another tax under general words in a statute which would seem to imply that it may be taxed a second time. Quoting Cooley on Taxation, this opinion states:

"It is a fundamental maxim in taxation that the same property shall not be subject to a double tax payable by the same party, either directly or indirectly;
* * *

In the case of State ex rel. American Manufacturing Company vs. Koeln, 278 Mo. 28, 211 S.W. 31, the Supreme Court held that a tax levied and collected for a school district is an entirely different burden from the tax levied and collected for State purposes, even though a part of the State taxes so collected is in fact afterwards distributed by the State to school districts to be used in helping maintain the public school system. That case held that consequently an income tax levied for State purposes, under a statute which authorizes income taxes to be reduced only by the property taxes paid "to the State", does not amount to double taxation for school purposes. However, we believe that that case should be distinguished from yours because of a different state of facts. The opinion in that case quoting Cooley on Taxation stated:

"One of the elements of illegal double taxation is that 'the subject of taxation shall directly contribute twice to the same burden while other subjects of taxation belonging to the same class are required to contribute but once.' * * *

Section 14767, R.S. Mo. 1939, provides that said library proposition shall be submitted to the voters at the annual election to be held on the first Tuesday in April, and said election is the annual school election as provided by Section 10418, R.S. Mo. 1939. The County Library Districts Law provides that the library proposition may be submitted to the voters at such election at the nearest and most convenient district schoolhouse within said County Library District. In

February 1, 1945

voting on said proposition in common school districts, the election should be held in conformity with the provisions of Section 10418, R.S. Mo. 1939. The school patrons attending select the officials to conduct the election commencing at 2:00 P.M. on the day of the annual meeting. In submitting the library proposition in town, city or consolidated school districts, the election is governed by the provisions of Section 10483, R.S. Mo. 1939, as amended by Laws of Missouri, 1943, page 885. The duties imposed upon the county clerk in Section 14767, R.S. Mo. 1939, are reserved to him, and not conferred on the Jackson County Election Board. See Section 11858, R.S. Mo. 1939, providing the Election Board Article does not apply to school elections.

Section 14767, R.S. Mo. 1939, provides:

"* * * all voters, otherwise qualified and residing in such school district and outside the limits of such city or town, shall be eligible to vote on any proposition or matter of such library district, * * * "

Such qualified voters, in our opinion, should merely meet the qualifications of Section 10420, R.S. Mo. 1939, which provides:

"* * * A qualified voter within the meaning of this chapter shall be any person who, under the general laws of this state, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote."

We therefore are of the opinion that any person 21 years of age who has resided in the State of Missouri one year, in Jackson County sixty days, and in the school district where the proposed election is to be held, thirty days next preceding the date of the holding of the election at which he or she offers to vote, and is properly registered where registration is required, is a qualified voter within the meaning of Section 10420, R.S. Mo. 1939.

CONCLUSION.

From the foregoing, it is the opinion of this department:

1) That the territory of the Kansas City Missouri School District outside the corporate limits of Kansas City,

February 1, 1945

should be excluded from the proposed County Library District, as the taxpayers of said district are already maintaining a public library, supported by school taxes, and that to so include said territory might raise a question as to the validity of the tax in view of Section 3 of Article X of the Constitution.

2) That the library election should be held at the annual school election on the first Tuesday in April.

3) That the library election may be voted on in the common school districts at the district schoolhouses, and in a city, town or consolidated district in the voting places designated by the School Board in accordance with Section 10483, R.S. Mo. 1939, as amended by Laws of Missouri, 1943, page 885.

4) That the manner of conducting said election will be governed in common school districts by Section 10418, and in a town, city or consolidated district by Section 10483, as amended supra.

5) That the County Clerk of Jackson County, Missouri, has the power to carry out the duties imposed on him by Section 14767.

6) That qualified voters entitled to vote at such election are persons who under the general laws of the State would be allowed to vote in the county for State and County officers, and who have resided in the school district for thirty days next preceding the annual school meeting.

Respectfully submitted,

R. WILSON BARROW
Assistant Attorney General

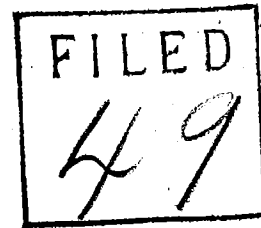
APPROVED:

HARRY H. KAY
(Acting) Attorney General

RWB:ir

APPROPRIATION: Section 13051, R. S. Mo. 1939, is not
CONSTITUTION : in conflict with Section 43, Article IV,
and is therefore constitutional.

February 21, 1945



3/8

Honorable R. J. King, Jr.,
Chairman, Appropriations Committee,
Missouri House of Representatives,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of
February 14, requesting an official opinion from this
department, which reads:

"In drawing up Appropriation Bills
for State Institutions, I am con-
fronted with a problem arising out
of Section 13051, R.S. Mo., 1939.

"I would like an opinion as to whether
or not such Section is constitutional
under the provisions of Section 43,
Article IV of the Constitution."

Section 13051, Revised Statutes of Missouri 1939,
reads:

"All fees, funds and moneys from
whatsoever source received by any
department, board, bureau, commis-
sion, institution, official or
agency of the state government by
virtue of any law or rule or regula-
tion made in accordance with any law,
shall, by the official authorized to
receive same, and at stated intervals,
be placed in the state treasury to
the credit of the particular purpose
or fund for which collected, and shall
be subject to appropriation by the
General Assembly for the particular
purpose or fund for which collected
during the biennium in which collected
and appropriated. The unexpended
balance remaining in all such funds
(except such unexpended balance as may

remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; Provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds, from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

Section 43, Article IV of the Constitution of Missouri reads;

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. All appropriations of money by the successive General Assemblies shall be made in the following order:

First, For the payment of all interest upon the bonded debt of the State that may become due during the term for which each General Assembly is elected.

Second, For the benefit of the sinking fund, which shall not be less annually than two hundred and fifty thousand dollars.

Third, For free public school purposes.

Fourth, For the payment of the cost of

assessing and collecting the revenue.

Fifth, For the payment of the civil list.

Sixth, For the support of the eleemosynary institutions of the State.

Seventh, For the pay of the General Assembly, and such other purposes not herein prohibited as it may deem necessary; but no General Assembly shall have power to make any appropriation of money for any purpose whatsoever, until the respective sums necessary for the purposes in this section specified have been set apart and appropriated, or to give priority in its action to a succeeding over a preceding item as above enumerated."

No court has ever construed Section 13051, supra. At first blush it appears as if Section 43, supra, intended to include not only revenue but all other moneys received from any source whatsoever, however this is not true.

It is well established that there is a presumption in favor of the constitutionality of legislative enactment, and that courts in construing statutes as to their constitutionality will construe every intendment in favor of its validity and that it must be presumed to be constitutional unless it clearly appears to be repugnant to the Constitution. Volume 11, Section 128 of American Jurisprudence, page 776, reads:

"The basic principle which underlies the entire field of legal concepts pertaining to the validity of legislation is that by enactment of legislation, a constitutional measure is presumed to be created. In every case where a question is raised as to the constitutionality of an act, the court employs this doctrine in scrutinizing the terms of the law. In a great volume of cases the courts have enunciated the fundamental rule that there is a presumption in favor of the constitutionality of a legislative enactment. * * * *"

In *State ex inf. v. Merchants Exchange*, 269 Mo. 346, l.c. 356, the Supreme Court of the State of Missouri also expressed this same rule. In so holding the court said:

"We shall not discuss the fundamentals in statutory construction, when the

validity of a statute is at stake. It goes without the saying that there is a legal presumption of validity; that if there is doubt as to the constitutionality of the law the doubt shall be resolved in favor of the validity of the legislative act; that the expediency or in expediency of the act is not for the courts; that in Missouri the power of the Legislature to enact laws has no limitation, except the express limitations in the State and Federal Constitutions; that the legislative power under the police powers of the State is very broad."

Prior to the enactment of Section 13051, supra, by the 57th General Assembly, many fees collected by some boards could be expended by said boards without the necessity of an appropriation by the Legislature. The courts held this was true by reason that it did not constitute state revenue and that the Legislature had created such boards and they were self-supporting. See Ex parte Daniel Lucas, 160 Mo. 218. In that case there was a law in effect providing that each member of the Barber Board should receive \$3.00 per day for services rendered and also an allowance for necessary traveling expenses, which should be paid out of any money in the hands of the treasurer of the board. It was contended that such provision conflicted with the provision of Section 43, Article IV of the Constitution. In overruling this contention the court said:

"The fourth contention is not well founded for the simple reason that section 43 of article 4, applies only to money provided for and received by the State. The money authorized to be collected under this act is not State revenue, but is simply a provision to make the board of examiners self-supporting."

In view of the foregoing citation from Ex parte Lucas it is quite apparent to the writer that the court in construing Section 43, Article IV of the Missouri Constitution, thought such fees received by the Barber Board did not come within that provision, which reads in part:

"All revenue collected and moneys received by the State from any source whatsoever * * * * ."

Since the enactment of Section 13051, supra, such fees may no longer be expended without an appropriation by the Legislature. The Legislature can only pass laws that are not prohibited by the State and Federal Constitution. In Volume 11 of American Jurisprudence, page 801, Section 135 in part reads:

" * * * * The only test of the validity of an act regularly passed by a state legislature is whether it violates any of the express or implied restrictions of the state or Federal Constitutions, and all acts of the legislature are valid unless they so conflict. * * * "

In the same Volume, page 894, Section 193, we find the following principle of law:

"In accordance with the doctrine that the state Constitution is not a grant of power, but only a limitation, as far as the legislature is concerned, it is a recognized principle of constitutional law that except where limitations have been imposed by the Federal or state Constitution, the power of a state legislature is unlimited and practically absolute, and that, therefore, it covers the whole range of legitimate legislation."

There is an exception contained in Section 13051, supra, which reads:

" * * * (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State) * * * ."

We construe this to mean that the General Assembly cannot enact legislation that will defeat the provisions of any constitutional amendment. There are certain appropriations made by the Legislature against funds deposited in the State Treasury, which funds were created by some constitutional amendment, and the money in said funds under said amendment cannot be spent for any other purpose or by any one else except as provided in the amendment. We refer to such amendments as the one creating the Conservation Commission fund in Section 16, Article XIV of the Missouri Constitution, and

the amendment pertaining to the State Highway Commission. So that accounts for the foregoing exception in Section 13051.

In the same statute, 13051, supra, we also find a proviso which provides that such moneys received under said proviso are excepted from the provisions of Section 13051, and which reads as follows:

" * * * Provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

From a careful examination of the foregoing exceptions we are of the opinion that any moneys received under the foregoing proviso do not constitute revenue collected and moneys received by the State from any source whatsoever, as provided in Section 43, Article IV of the Constitution of Missouri.

In State ex rel. L. D. Thompson, State Treasurer, v. Board of Regents of Northeast Missouri Teacher's College, 305 Mo. 57, the court held that neither Section 43, Article IV, nor Section 15, Article X of the Missouri Constitution, required the board to pay into the treasury insurance money received on policies issued to the board and paid for by tuition fees, in settlement of losses sustained when the college building was destroyed by fire, and that the board can use such insurance money to restore said building. The court further held that there was no statute classifying this money as "state moneys"; that the statute required an annual report of money received from appropriations, incidental fees and other sources, and the distribution thereof, implying that the board could receive and disburse, without placing in the State treasury, money received from the insurance company; that a statutory enactment was a prerequisite to such payment and its receipt and deposit by the treasurer to entitle it, under the Constitution, to be classified as state money. In so holding the court said:

"The constitutional provision invoked by relator as the underlying authority

February 21, 1945

for the issuance of this writ is but one of the many restrictions to be found in the Constitution of 1875 concerning the custody and expenditure of the revenue. The moving cause for the incorporation of these restrictions in the Constitution was to put an end to an era of extravagance and waste in the use of the revenue which had prevailed for more than a decade prior thereto - the Constitution of 1865 containing no such limitation as is found in the provision under consideration. This provision, it will be seen from its terms, which are wisely chosen as a limitation upon power, is restricted to 'revenue collected and money received by the State from any source whatsoever.' By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the State from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources as our numerous statutes attest, but no matter from what source derived, if required to be paid into the Treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment or, as aptly put by the respondent, state money means money the State, in its sovereign capacity, is authorized to receive - the source of its authority being the Legislature. With this limitation - and the Constitution itself is but an instrument of limitations - it should be strictly construed. Thus construed the spirit which prompted the adoption of the provision is fully recognized and its purpose is promoted. Unless, therefore, it can be successfully contended in harmony with well recognized rules of interpretation that the Board of Regents of the College is the State and that moneys received by it other than from appropriations is state money, the constitutional provision will afford no support to the relator's contention." (Underscoring ours.)

In the foregoing case the fire insurance policy was purchased by the Board of Regents of the Northeast Missouri Teacher's College out of certain student's fees paid to the board.

Honorable W. J. King, Jr.

-8-

February 21, 1945

In view of the foregoing authority, unquestionably funds from student activities, hospital fees, gifts and trust funds for state educational institutions, and gifts and grants from the Federal Government do not constitute revenue collected and money received by the State, as provided in Section 43, Article IV of the Constitution of Missouri.

Therefore, it is the opinion of this department that, since there is no conflict between Section 13051, Revised Statutes of Missouri 1939, and Section 43, Article IV of the Constitution of the State of Missouri, and in view of the fact that the presumption is in favor of the constitutionality of any enactment, unless it clearly appears to be repugnant to the Constitution, Section 13051, supra, is constitutional.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:ml

MILEAGE FEES: Marshal, sheriff or other officer operating under Sec. 13414, R. S. 1939, entitled to charge ten cents for each mile actually traveled in completing service of process, when served more than five miles from place where issued.

May 11, 1945

5/11/9
FILED

49

Honorable George Kitchen, Marshal
Kansas City Court of Appeals
Kansas City, Missouri

Dear Mr. Kitchen:

Your letter of May 8th addressed to the Attorney General, requesting an opinion of this department, is hereby acknowledged. Your letter of request is as follows:

"Will you kindly give me an opinion on the matter of mileage in serving writs or orders from this court when served more than five miles from this court house?

"For a number of years I have acted under what is now Section 13414, R. S. Mo. 1939, which specifies that the sheriff 'shall be allowed * * * ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court.' When John M. Dalton was Marshal of the Supreme Court, he advised that that Court permitted him to charge ten cents for each mile traveled, that is, on the round trip.

"The present situation arises from service of a writ of habeas corpus served in St. Joseph, Missouri. It is 55 miles from the Court House here to the Court House in St. Joseph, or 110 miles round trip. Am I entitled to tax as costs mileage of \$5.50, or \$11.00 as has always been the custom? If the mileage is computed one way,

it will, of course mean that I could charge mileage going to the destination and have to dead-head back, or in other words, charge five cents per mile for miles actually traveled."

The question involved seems to call for a construction of Section 13414, R. S. Mo. 1939, which section provides as follows:

"Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in saving (serving) any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held; Provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

While this question has not been passed upon by the courts in this State, still it would appear, from the decisions of other states where the same question has arisen, that a broad interpretation of our statute should be applied. Corpus Juris, Vol. 57, page 1131, par. 1199, says the following:

"Except in some jurisdictions, statutes relating to the mileage of sheriffs and constables are construed to allow mileage on a circular or round trip basis, or, in other words, for each mile traveled on the journey not only going but also returning."

With reference to sheriff's fees, the courts of Colorado and Kansas have held that such officer is entitled to mileage on the return trip when serving legal process. Cited in support of this are the following:

Sargent v. LaPlata County, 21 Colo. 158:

"In counties of the fourth class the sheriff is entitled for serving a mittimus to mileage of ten cents per mile in going to and returning from the place to which he takes a prisoner, and also to twenty cents per mile for the distance traveled while he has the prisoner in charge."

Norton v. Simms, 85 Kans. 822, holds the following:

"Under the statutory provision fixing the compensation of the sheriff for travel in serving or endeavoring to serve process the mileage is to be computed on the round trip basis, giving him ten cents per mile or fraction of a mile on the whole journey. He is not entitled to the full fee for the fraction on the going trip and for another fraction on the returning trip."

With respect to mileage allowed the sheriff and marshal operating under the above section (13414), it is apparent that they are entitled to charge ten cents a mile for each mile actually traveled in serving venire summons, writs, subpoenas or other orders of the court when served more than five miles from the place where the court is held.

In serving such writs, orders, etc., service is not complete until a return is made. A return is made upon the officer returning the same to the court from which he received it. Thus, it would take the round trip to complete service on any of such process issued by the court, and the mileage should be computed upon the trip, both going and returning.

Conclusion

Therefore, it is the opinion of this department that when a marshal, sheriff or other officer shall serve venire

Hon. George Kitchen

-4-

May 11, 1945

summons, writ, subpoena or other order of the court, when such service is more than five miles from the place where the court is held, he is entitled to charge ten cents a mile for each mile traveled while going and returning from and to the court which issued such process.

Respectfully submitted,

GORDON P. WEIR
Assistant Attorney General

APPROVED:

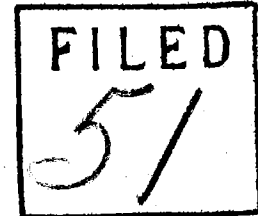
J. E. TAYLOR
Attorney General

GPW:EG

STATE SENATORIAL REDISTRICTING
COMMISSION:

- (1) Necessity of appropriation by General Assembly for payment of salaries of members of Commission;
- (2) Right of Commission to reimbursement for outlays for necessary clerical help.

June 14, 1945



Honorable H. P. Lauf
Honorable George A. Rozier
Members, Senatorial
Redistricting Commission
Jefferson City, Missouri

Gentlemen:

This will acknowledge receipt of your letter of June 13, 1945, in which you submit the following for our opinion:

"The Senatorial Redistricting Commission, at its first meeting on June 6, 1945, authorized the undersigned, for and on behalf of the Commission, to request your opinion upon the following questions:

"1. Will it be necessary for the General Assembly to pass an appropriation bill for the committee's salary?

"2. May the General Assembly constitutionally enact appropriate legislation providing for the employment of clerical help by the Commission?"

With respect to the first question you propose, we direct your attention to a portion of Article IV of Section 15 of the Constitution of 1945, reading as follows:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and re-

June 14, 1945

turns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. * * * "

Further, to the following provisions of Section 28 of the same Article:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. * * * "

Similar provisions appeared in the Constitution of 1875, being, respectively, Section 43 of Article IV and Section 19 of Article X. In construing the provisions of these sections, the Supreme Court of Missouri, in the case of *State ex rel. v. Gordon*, 236 Mo. 142, 1. c. 157, said:

"It is provided by section 43, article 4 of the Constitution of this State that: 'All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit any money to be drawn from the treasury, except in pursuance of regular appropriations made by law.' And by section

June 14, 1945

19, article 10, that: 'No moneys shall ever be paid out of the treasury of this State, or of any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such sum or object.'

"The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have no difficulty in deciding that in the absence of an appropriation made by the General Assembly for that purpose no funds could be lawfully paid out of the State treasury for the support and maintenance of the game department, nor would relator be entitled to the audit and allowance of his accounts for salary and expenses."

The principle enunciated in the case cited was further affirmed in the case of *Nacy v. Le Page*, 111 S. W. (2d) 25, 1.c. 26, wherein the court said:

" * * * The state treasurer, in his official capacity and in the funds of the state treasury, has no goods, moneys, or effects of any private citizen in his custody, nor does he owe a debt from the treasury to any one. He is a custodian of public funds, raised by taxation, which belong to the state. His duty is to pay out these funds

only 'in pursuance of an appropriation by law' which 'shall distinctly specify the sum appropriated, and the object to which it is to be applied.' Section 19, article 10, Constitution. * * *

From the foregoing, we believe that it will be necessary that an appropriation bill be passed by the General Assembly to provide for the payment of the salary of your Commission.

Your second question involves the power of the General Assembly to enact appropriate legislation providing for the employment of clerical help by the Commission.

It is a well established rule of law that a State Constitution is a limitation upon the power of the General Assembly rather than a grant of power to that body. In other words, the General Assembly is free to enact any legislation which it is not forbidden to do by the State Constitution or Federal Constitution.

In the case of State ex rel. v. Canada, 113 S. W. (2d) 783, 1. c. 785, the Supreme Court of Missouri said:

"Our State Constitution is not a grant but a limitation on legislative power, so the Legislature may enact any law not expressly or impliedly prohibited by the Federal or State Constitution." (Citing authorities.)

In the case of State ex rel. v. Southwestern Bell Telephone Co., 179 S. W. (2d) 77, 1. c. 80, the Supreme Court said:

"The Legislature having plenary power to enact laws, absent constitutional restrictions, such restrictions must be expressed in the Constitution or clearly implied by its provisions.' State v. Shelby, 333 Mo. 1036, 64 S. W. 2d 269, loc. cit. 271. "There is no better settled law in our state than the rule that courts will not hold a statute to be unconstitutional unless it contravenes the organic law in such a manner as to leave no doubt of its unconstitutionality." * * *"

An examination of the present Constitution of Missouri does not reveal any provision which would prohibit the General Assembly from authorizing the Senatorial Redistricting Commission to employ clerical help in connection with the discharge of the duties of that body. By so doing, the General Assembly would not be encroaching upon the powers of the Senatorial Redistricting Commission in any way but would be lending aid to said Commission. In view of the fact that there is no prohibition against the General Assembly passing such legislation, it must follow, in view of the above authorities, that the General Assembly can enact such legislation.

In this connection it should be considered whether or not the Senatorial Redistricting Commission has power to employ necessary clerical help without the aid of an act of the General Assembly.

Section 7 of Article III of the Constitution of 1945 provides, in part, as follows:

" * * * The commission shall re-apportion the senators by dividing the population of the state by the number thirty-four, and the population of no district shall vary from the quotient by more than one-fourth thereof. The commission shall file with the secretary of state a full statement of the numbers of the districts and the counties included in the districts, and no statement shall be valid unless approved by seven members. After the statement is filed senators shall be elected according to such districts until a re-apportionment is made as herein provided, except that if the statement is not filed within six months of the time fixed for the appointment of any such commission it shall stand discharged and the senators to be elected at the next election shall be elected from the state at large, following which a new commission shall be appointed in like manner and with like effect. No such reapportionment shall be subject to the referendum."

It will be seen by the foregoing constitutional provision that the Redistricting Commission is given express authority to

June 14, 1945

divide the State of Missouri into senatorial districts, and when it has so done in accordance with said provisions, such division shall be controlling. Said provision does not undertake to set out the details of the actions and proceedings of said Commission, but it does give the Commission the express authority to divide the State into senatorial districts. The question then presents itself as to how much authority is thus given to the said Commission by the constitutional provision above quoted.

In construing the meaning and effect of said constitutional provision, the same rules of construction should be applied as are applied to the construction of statutes enacted by the General Assembly. In the case of *State ex rel. v. Imel*, 242 Mo. 293, 1. c. 301, the court quoted with approval the following:

"The established rules of construction applicable to statutes also apply to the construction of Constitutions." (8 Cyc. 729.)"

Some well established rules of statutory construction are, therefore, in order. In the case of *State ex rel. v. Wymore*, 132 S. W. (2d) 979, 1. c. 987, the Supreme Court said:

"The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers." *Throop's Public Officers*, Sec. 542, p. 515.

"Necessary implications and intendments from the language employed in a statute may be resorted to to ascertain the legislative intent where the statute is not explicit, but they can never be permitted to contradict the expressed intent of the statute or to defeat its purpose. That which is implied in a statute is as much a part of it as that which is expressed. A statutory grant of a power or

right carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete, but powers specifically conferred cannot be extended by implication.' * * *"

Applying the above rules of construction to the constitutional provision respecting the Senatorial Redistricting Commission, we must conclude that the Commission has whatever authority and power is necessary to effectuate the dividing of the State of Missouri into senatorial districts. The State of Missouri is a large State with approximately four million people residing therein. The Commission is required by the constitutional provision to reapportion the senators by dividing the population of the State by the number thirty-four, so that the population of no district shall vary from said quotient by more than one-fourth thereof. There are one hundred fourteen counties and the City of St. Louis within the State. It can easily be seen that to effect such reapportionment of senators in accordance with the spirit and letter of the Constitution will require clerical work which the members of the Commission themselves could not do efficiently. It would appear, therefore, that employment of necessary clerical help by the Commission would not be an unauthorized act, but in fact such employment would be legal.

However, even though the Senatorial Redistricting Commission has authority to employ necessary clerical help to enable it to effectively perform its functions, it does not follow that the Commission has authority to pay such help out of State funds. As pointed out above, money cannot be withdrawn from the treasury of the State without an appropriation act. Therefore, before the services of such clerical help could be paid for out of State funds, there must be an appropriation available therefor. If the General Assembly should pass an act authorizing the Commission to employ clerical help, and should also pass an appropriation act to provide funds for the payment of such clerical help, then the Senatorial Redistricting Commission could cause such expenses to be paid out of the State treasury. In the event the General Assembly does not pass an act authorizing the Commission to employ clerical help, but does pass an appropriation act to make available funds for the payment of necessary expenses incurred by the Senatorial Redistricting Commission, then the Commission could present bills for reimbursement of amounts expended by them for clerical help which was necessary to the

proper functioning of said Commission, and said bills could be lawfully paid out of such appropriation.

The Supreme Court of Missouri has on numerous occasions held that an officer was entitled to be reimbursed for money necessarily expended by him in the performance of the duties of his office. In the case of *Ewing v. Vernon County*, 216 Mo. 681, 1. c. 695, the Supreme Court said:

"The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'"

In the late case of *Rinehart v. Howell County*, 153 S. W. (2d) 381, the Supreme Court quoted with approval the foregoing citation from the *Vernon County* case, and approved the payment by a county for reimbursement to the prosecuting attorney for money which he had expended for stenographic help where it was found that such stenographic services were indispensable to the performance of the duties of his office.

In line with these authorities, we think it is clear that if the Senatorial Redistricting Commission is compelled to furnish clerical services in order to carry out the functions of said body, such Commission would be entitled to be reimbursed for said sums so expended, provided, of course, a fund is made available for said purpose by appropriation.

CONCLUSION

It is, therefore, the opinion of this department that (1) it will be necessary that an appropriation bill be passed by the

June 14, 1945

General Assembly to provide for the payment of the salary of the members of the Senatorial Redistricting Commission; (2) that the General Assembly can enact appropriate legislation providing for the employment of clerical help by the Senatorial Redistricting Commission set up by the Constitution of Missouri; (3) that the Senatorial Redistricting Commission is entitled to be reimbursed for money expended for clerical help necessary for the proper performance of the functions of that Commission even without an act of the General Assembly expressly authorizing it to employ such help; but (4) that in the absence of an express statute authorizing the employment of clerical help by the Senatorial Redistricting Commission, such Commission could only be reimbursed for such expenditures provided the General Assembly appropriates money for said reimbursement.

Respectfully submitted,

WILL F. BERRY
Assistant Attorney General

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB/HHK:HR

CONSTITUTIONAL LAW: Board of Jury Commissioners for Jackson County shall follow provisions of Sections 697 and 719, R. S. Mo. 1939, until July 1, 1946, unless sooner amended to conform to new Constitution.

May 4, 1945.



Honorable Andrew P. Leacy, Clerk
Board of Jury Commissioners
302 County Courthouse
Kansas City 6, Missouri

Dear Mr. Leacy:

Under date of May 3, 1945, you wrote this office requesting an opinion as follows:

"We are desirous of securing a ruling on the matter with reference to women serving as jurors.

"Section 22 of our new Constitution provides as follows:

"'No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror.'

"Section 697, R. S. Mo. 1939, provides as follows:

"'Every juror, grand and petit, shall be a male citizen of the state, resident of the county, sober and intelligent, of good reputation, over twenty-one years of age and otherwise qualified.'

"Section 719, R. S. Mo. 1939, provides as follows:

"'In all trials of civil actions in any court of record in this state a jury

May 4, 1945

shall consist of twelve men possessing the qualifications as are or may hereafter be provided by law: * * *

"Will you please advise us as soon as possible whether the above constitutional provision is self-executing, or if it will require legislation to make it effective."

The answer to your question is found in Section 2 of the Schedule of the new Constitution, which is as follows:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Inasmuch as Section 697, R. S. Mo. 1939, and Section 719, R. S. Mo. 1939, quoted in your letter, are in conflict with Section 22, Article I, of the new Constitution, those sections of the statute, under the provisions of Section 2 of the Schedule of the new Constitution hereinabove quoted, will remain in force and effect until the first day of July, 1946, unless sooner amended or repealed to conform to the provisions of Section 22, Article I, of the new Constitution.

Conclusion

It is, therefore, the opinion of this office that the Board of Jury Commissioners for Jackson County will follow the provisions of the statutes mentioned in your letter until these statutes are amended or repealed.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TAXATION:

Is a Missouri resident liable for income taxes on salaries and earnings outside of the State of Missouri?

INCOME TAX:

Is a citizen of a bordering state liable for income tax on salaries or income earned within the State of Missouri?

May 16, 1945.

5/19



Honorable Joseph A. Lennon,
Assistant Attorney General,
901 Central National Bank Bldg.,
St. Louis, Missouri.

Dear Mr. Lennon:

I. This will acknowledge receipt of your letter addressed to Hon. J. E. Taylor, Attorney General, under date of May 2, 1945, which is in part as follows:

"I believe we should have an opinion from your office covering both of these questions, to-wit:

"1. Is a Missouri resident liable for income taxes on salaries and earnings outside of the State of Missouri?

"2. Is a citizen of a bordering state liable for income tax on salaries or income earned within the State of Missouri?"

II. Please be advised as follows:

(a) That Section 11343, R. S. Mo. 1939, provides in part as follows:

"A per centum tax shall be levied upon, assessed against, collected from and paid by every individual, a citizen or resident of this state, upon net income received from all sources during the preceding year in excess of the exemptions now or hereafter provided, and a like tax shall be levied upon, assessed against, collected from and paid by every individual, not a resident or citizen of this state, upon net income received from all sources within the state, during the preceding year in excess of the exemptions now or hereafter provided* * *."

(b) The per centum of the tax on net income above referred to, levied upon, assessed against and collected and paid shall be determined as follows:

(1) The remainder of the section definitely sets out the rate of and the method of determining the amount of the tax.

III. Section 11345 R. S. Mo. 1939, provides in part as follows:

(a) "Income shall include gains, profits, and earnings derived from salaries, wages or compensation for personal services of whatever kind and in whatever form paid; and from professions, vocations, businesses, trade, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or the use of any interest in real or personal property; and from interest, rent, dividends, securities and gains, profits and earnings from any other transactions of any business carried on for gain or profit; and from any source whatever; * * *".

(b) "The net income shall be determined by deducting from income, deductions now or hereafter provided by law."

(c) "The State Auditor may prescribe reasonable rules and regulations for the administration of the provisions of the laws relating to the levy, assessment, collection and payment of taxes based on incomes,* * *", (which he has not done to date.)

IV. Section 11365, R. S. Mo. 1939, provides:

(a) "That the State Auditor shall prescribe forms and furnish them to the various county or district assessors for the use of the taxpayer, and shall give instructions and opinions for carrying this chapter into effect, and all of his instructions shall be strictly complied with.* * *".

V. Section 11354, R. S. Mo. 1939, provides in part as follows:

(a) "That on the first of January, or soon thereafter of each year, the taxpayer shall apply to his district for forms on which to make a return of income for the preceding year, and that the return shall be filed on or before March 15 of the current year.* * *"

(b) "It is further provided in the chapter that all taxes assessed on account of income shall become delinquent on June 2nd of the current year, and if not paid within thirty days after delinquency, the county collector shall certify all delinquencies to the State Auditor, who shall within sixty days certify the names of the delinquents to the Attorney-General, who is authorized to bring suit, or to direct the prosecuting attorneys of the counties to do so, to recover the tax and the penalties."

VI. Section 11358 R. S. Mo. 1939, provides as follows:

(a) "Persons residing within the state shall make an income tax return to the assessor.

(b) "Persons residing without the state and deriving income from within the state shall make an income tax return to the assessor where his or their chief office is located, and if he or they have no office in this state, then the State Auditor shall designate the district where the taxpayer should file his return."

VII. Section 11359 R. S. Mo. 1939, provides that a certified copy of the federal tax return of the taxpayer must be attached to his state return and only the amount of the income received in this state is required to be shown on the verified copy of a nonresident taxpayer.

VIII. Various sections of the Income Tax Act provide exemptions and deductions to be taken into account in arriving at a net income, but Section 11349 provides for another deduction on income, in any taxable year, on which a tax is imposed by, and paid to, another state, and when such income is shown in said taxpayer's return; and it is further provided that a nonresident taxpayer can receive the benefits of exemptions provided for in Section 11351, only by filing with the assessor a true and accurate return of his total income received from all sources in this state;

IX. It will be seen from the foregoing quotations and statements of the law that the Income Tax Act levy is on income of citizens or residents of this state received from all sources, less certain deductions and exemptions, and that a deduction on income on which a tax is paid in another state, if shown in the taxpayer's return, is allowed.

X. Therefore, it would seem that the answers to your questions lie in the interpretation of the foregoing quotations and expressions of the law, and also turn on the question of what is income and what is source.

XI. Webster's New International Dictionary defines "income" as: a coming in, an entrance, an advance, something that comes in, as an addition, and an increase in the taxpayer's economic wealth.

Also, "income" is defined as something derived from property, labor, skill, ingenuity or sound judgment, or from two or more of them in combination. *Diefendorf v. Gallet*, 10 Pac. (2d) 307.

Income, subject to taxation, consists of increase in the taxpayer's economic wealth and is derived from labor, use of capital, including land, and profits from sale or exchange of capital assets, which profits represent accretion in value of such assets while in the taxpayer's hands. *Petition of the Union Electric Co. of Mo. Sup.* 161 S.W. (2d) 968.

XII. The word source is defined by the Standard Dictionary, and adopted as the language of the Missouri Supreme Court in 146 S.W. (2d) 631, and is as follows: The word source conveys only one idea - that of origin. That from which any account, gain or effect proceeds; a person or thing that originates, sets in motion, or is a primary agency in producing any course of action or result, a place where something is found or whence it is taken or derived.

XIII. It will be observed that Section 11343, supra, levies a tax on net income received by citizens or individuals of this state, from all sources, in excess of certain exemptions and deductions. *Atrophane Corp. v. Coala*, 133 S.W. (2d) 343, l.c. 349.

XIV. The State of Illinois has no income tax law, but that fact would not be a controlling factor here, only that the taxpayer could not claim deductions on income that he had paid to another state; but other states do have income tax laws from which many persons are employed in this state, and also, no doubt, there are many residents of Missouri employed in states which do have income tax laws and which collect an income tax from residents in Missouri who happen to be employed in that state.

XV. Referring to Paragraph VIII it will be seen that the taxpayer, who shows in his return income on which a tax was paid in another state, can deduct that amount from his gross income. It will also be seen that a nonresident may receive exemptions enumerated in Section 11351, R. S. Mo. 1939, only if he files a correct return, as provided for in that Section.

XVI. THEREFORE, it is the opinion of this department that, if a resident of this state makes a return as provided for by law, he can deduct income received in another state on which he has paid an income tax to such other state.

It is also the opinion of this department that a non-resident is liable for income tax on salaries and income earned within this state, but he is entitled to the exemptions provided by Section 11351 R. S. Mo. 1939, upon complying with the provisions thereof.

Respectfully submitted,

HARRY J. SALSBUURY
Assistant Attorney-General

APPROVED:

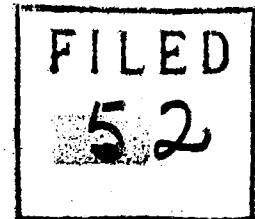
J. E. TAYLOR
Attorney-General.

HJS/LD

CONSTITUTIONAL LAW: Senate Bill 165 does not attempt to authorize impairment of obligations of contracts and is not in conflict with the United States Constitution.

June 20, 1945

6-22



Honorable Arnold Leonard
Room 319 Capitol Building
Jefferson City, Missouri

Dear Senator Leonard:

Under date of June 8, 1945, you wrote the Attorney General and made the following request for an opinion:

"I am enclosing herewith two copies of Senate Bill No. 165, introduced by myself and Senators Miller, Frisby and Sunderwirth.

"We presented this bill to the Appropriations Committee a day or so ago and the committee appointed me, a committee of one, to inquire of you as to its constitutionality on the following ground: Whether or not the bill violates the provision of the U. S. Constitution, which prohibits the state from making a law impairing the obligation of contracts. The question more particularly being, whether the legislature can, as this bill provides, require the payment of these certificates of indebtedness before some of them are due, or whether we shall have to wait and pay them off as they mature.

"I am enclosing herewith a list of the certificates of indebtedness owed to the school fund and the seminary fund, together with the dates of maturity. It is my impression that those which have already matured have been replaced by new certificates of indebtedness. For the

June 20, 1945

background of these certificates of indebtedness, I refer you to Report No. 4 by the Committee on Legislative Research which last month filed said report on this subject.

"I do not think that the committee was of the opinion that any question was involved so far as the Constitution of Missouri is concerned, but if there is any such question in your opinion, of course, we should want to know of it."

The provision of the Constitution of the United States referred to in your letter is found in Section 10, Article I, which section is here quoted in part:

"No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

*****"

This clause of the Constitution of the United States has been applied in many cases, but one of the earliest cases decided contains language particularly applicable to your question. The case is *The Trustees of Dartmouth College v. Woodward*, 4 L. Ed. 629, and the following passage from l. c. 657 is the language referred to:

"The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed

in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

"But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations nor those for whose benefit they are made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed, while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives, in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenances of the college charter.

"It becomes, then, the duty of the court most seriously to examine this charter, and to ascertain its true character."

And it is now our duty to determine the nature of the certificates of indebtedness of the State to the Public School Fund and to the Seminary Fund in order to apply the law as quoted. For convenience and to better illustrate the discussion, a copy of one certificate is herein set out:

"THE STATE OF MISSOURI

{ S E A L }

"TO ALL WHO SHALL SEE THESE PRESENTS--
GREETING:

"KNOW YE THAT: It is hereby certified that the State of Missouri is indebted to the State Board of Education of said State, as trustees, for the Public School Fund of said State, in the sum of one thousand dollars (\$1,000) payable twenty years after date, upon which sum the said State hereby promises to pay to the State Board of Education, as trustee as aforesaid, interest semi-annually, at the rate of five per centum per annum, out of any money in the State Treasury not otherwise appropriated; said interest to be paid on the first day of July and of January, each year, and applied to the maintenance of the free public schools as provided by law.

"This certificate of indebtedness represents certain sums of money paid into the State Treasury and placed to the credit of the State School Fund, being unclaimed dividends of insolvent insurance companies paid into the State Treasury by the Superintendent of Insurance, also proceeds of the sale of Saline lands, and is issued in pursuance to sections 11593, 11594 and 11595, Revised Statutes 1919, and is non-negotiable, unconvertible and non-transferable, and shall be sacredly held and preserved in the State Treasury as part of the Public School Fund of the State.

June 20, 1945

"IN WITNESS WHEREOF, I hereunto
set my hand and cause to be
affixed the GREAT SEAL of the
State of Missouri, Done at
Office in the City of Jefferson,
State of Missouri, this sixth
day of January Nineteen
Hundred and Forty five .

BY THE GOVERNOR:

(Signed) Forrest C. Donnell
Governor.

(OFFICIAL) (Signed) Gregory C. Stockard
) SEAL) Secretary of State.

By (Signed) L. B. Hartley
L. B. Hartley,
Chief Clerk. "

Certificates of this nature totaling \$4,398,939. 92 have been issued by the State to the Public School Fund and the Seminary Fund. All of the certificates draw interest at either five or six percent per annum (Report No. 4, Legislative Research Committee).

It will be observed from the copy of certificate set out that it certifies that the State is indebted to the State Board of Education, as Trustee for the Public School Fund, a certain sum of money. The State Board of Education is solely a governmental board. Section 4, Article XI, Constitution of 1875 and Section 10663, R. S. No. 1938. The Public School Fund and the Seminary Fund were set up by the Constitution of 1875, Section 26, Article X, as follows:

"All certificates of indebtedness of the State to the 'public school fund' and to the 'seminary fund' are hereby confirmed as sacred obligations of the State to said funds, and they shall be renewed as they mature for such period of time and at such rate of interest as may be provided for by law. The General Assembly shall have the power to provide by law for the issuing certificates to the public school fund and seminary fund as the money belonging to said

funds accumulates in the State Treasury: Provided, that after the outstanding bonded indebtedness has been extinguished, all money accumulating in the State treasury for above named purposes shall be invested in registered county, municipal or school district bonds of this State of not less than par value. Whenever the State bonded debt is extinguished or a sum sufficient therefor has been received, there shall be levied and collected, in lieu of the ten cents on the one hundred dollars valuation now provided for by the statutes, an annual tax not to exceed three cents on the one hundred dollars valuation, to pay the accruing interest on all the certificates of indebtedness, the proceeds of which tax shall be paid into the State treasury and appropriated and paid out for the specific purposes herein mentioned."

Following this constitutional provision, appropriate legislation has been enacted.

The Constitution of 1945 contains a different provision, Section 4, Article IX:

"All certificates of indebtedness of the state to the Public School Fund and to the Seminary Fund are hereby confirmed as sacred obligations of the state to said funds, and they shall be renewed as they mature for such time and at such rate of interest as may be provided by law. The general assembly may provide at any time for the liquidation of said certificates, but all funds derived from such liquidation, and all other funds hereafter accruing to said state school or state seminary funds, except the interest on same, shall be invested only in registered bonds of the United States or the state, bonds of school districts of the state, or bonds or other securities payment of which are fully guaranteed by the United States, of not less than par value. The general assembly may levy an annual tax sufficient to pay the

accruing interest of all state certificates of indebtedness."

All of the certificates of indebtedness have been executed on behalf of the State pursuant to statutory direction. Section 10881, R. S. Mo. 1939, provides as follows:

"Whenever a certificate of indebtedness of the state to the 'public school fund' or to the 'seminary fund' shall mature, it shall be canceled by the board of education and a new certificate for a like amount in renewal thereof shall be executed by the governor, as provided in the next section, payable to the 'public school fund' or to the 'seminary fund' (as the case may be) twenty years after the date thereof, bearing the same rate of interest as the maturing certificate, the interest to be payable semi-annually on the first days of January and July in each year. An entry of the cancellation of the matured certificate, and the execution of the renewal thereof, shall be entered upon the records of said board, and said renewal certificate of indebtedness shall be deposited with the state treasurer and his receipt therefor filed with the state board of education and noted upon its books."

From these exceedingly brief statements it is apparent that the Public School Fund and the Seminary Fund are funds set up by the State for public purposes. The certificates of indebtedness executed by the State to these funds are evidence only of a transaction by the State with its funds.

Conclusion

It is, therefore, the conclusion of this department that the clause of Section 10, Article I of the Constitution of the United States, prohibiting states from passing laws impairing the obligations of contracts, would not be violated by the passage of

Hon. Arnold Leonard

-6-

June 20, 1945

Senate Bill No. 165 by the General Assembly of Missouri.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

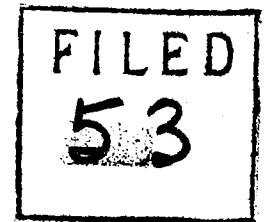
HARRY H. KAY
(Acting) Attorney General

WOJ:EG

CORPORATIONS: Authority of co-operative corporations organized under Art. 28, Chap. 102, R. S. Mo. 1939, to deal in the buying and selling of agricultural products.

June 18, 1945

6/30



Honorable Harry T. Limerick, Jr.
Representative, Boone County
House of Representatives Post Office
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter dated June 13, 1945, requesting an opinion of this office, and reading as follows:

"The St. Louis Bakers Co-op has approached me to introduce a bill to clarify Section 14406 of the Revised Statutes of Mo. 1939, so as to enable them to associate themselves together as a cooperative association. If allowed to organize under this Act, the co-op would chiefly engage in the business of buying and selling agricultural and dairy products such as flour, eggs, milk, butter, etc.

"I have checked Section 14406 and doubt if the statute needs clarification. I request an opinion as to whether this group of individuals, more than twelve in number, can incorporate under Section 14406 that seems to include 'any agricultural or mercantile business'."

Section 14406, R. S. Mo. 1939, to which you make reference in your letter of inquiry, reads as follows:

"Any number of persons, not less than twelve (12), may associate themselves together as a

June 18, 1945

co-operative association, society or exchange, having all the incidents, powers and privileges of corporations, for the purpose of conducting any agricultural or mercantile business on the co-operative plan, including the buying, selling, manufacturing, storage, transportation or other handling or dealing in or with by associations of agriculturists, of agricultural, dairy or similar products, and including the manufacturing transformation of such articles into products derived therefrom, and for the purpose of the purchasing of or selling to all shareholders and others groceries, provisions and all other articles of merchandise. For the purposes of this section the words 'association,' 'company,' 'corporation,' 'society' or 'exchange' shall be construed to mean the same."

We note from your letter of inquiry that the business which the proposed corporation contemplates engaging in will consist of buying and selling agricultural and dairy products such as flour, eggs, milk, butter, etc. We are of the opinion that business of that nature would be permissible under the broad scope of the phraseology employed in Section 14406, R. S. Mo. 1939, under which the proposed corporation would be formed. You will note that provision is made under that statute for any corporation organized thereunder to engage in "any agricultural or mercantile business." The following definitions of these terms, we think, lend support to the opinion that the business to be conducted by the proposed corporation would be within the scope of its corporate powers.

"The word 'agricultural' means pertaining to, connected with or engaged in 'agriculture,' which is the science of cultivating the ground, especially in fields or large quantities including the preparation of the soil, the planting of the seeds, the raising and harvesting of crops, and the rearing, feeding and management of live stock; tillage, husbandry, and farming." 3 Words and Phrases, Perm. Ed., page 36.

June 18, 1945

"The term 'mercantile business' is defined to mean the buying and selling of articles of merchandise as an employment." 27 Words and phrases, Perm. Ed., page 61.

The term "merchandise" is defined as follows: "All commodities which merchants usually buy and sell, whether at retail or wholesale; wares and commodities such as are ordinarily the objects of trade and commerce." Black's Law Dictionary.

From the foregoing, it is apparent that flour, eggs, milk, and butter are comprehended within the meaning of the term "agricultural products," as they are each the result of agricultural pursuits.

CONCLUSION

In the premises, we are of the opinion that a corporation organized under the provisions of Article 28 of Chapter 102, R. S. Mo. 1939, can lawfully engage in the business of buying and selling commodities such as flour, eggs, milk, butter, and similar agricultural and dairy products.

It must, of course, be borne in mind that any corporation organized under the provisions of Article 28, Chapter 102, R. S. Mo. 1939, must necessarily comply with all of the provisions of said chapter relating to the internal government of the corporation, the distribution of profits, the necessity for audit of the records, etc.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

GENERAL ASSEMBLY: Member of General Assembly ineligible for appointment as a member of the local Board of Public Works for the City of Bowling Green, Missouri.

July 9, 1945

Honorable Edward V. Long
State Senator
Bowling Green, Missouri

719
FILED

54

Dear Sir:

In your letter of July 3, 1945, you requested an opinion of this department, which letter reads as follows:

"Will you please give me an opinion at once as to whether or not there is anything to prevent me, while serving as State Senator, from accepting an appointment as a member of the local Board of Public Works for the City of Bowling Green. It runs in my mind that there is some statute that would prevent my serving on such board but I would appreciate having your opinion."

We direct your attention to Article III, Section 12, of the Constitution of 1945. This section reads as follows:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this

July 9, 1945

state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public."

We think Section 7798, Missouri Revised Statutes Annotated, is also pertinent. This section reads as follows:

"Any member of said board of public works, who shall accept a nomination or appointment for any other office during his official term, shall be deemed thereby to have resigned as a member of said board, and his said membership shall thereby be ipso facto vacated."

It is apparent from the first sentence of Section 12, Article III, of the new Constitution that if a member of the local Board of Public Works for the City of Bowling Green is an office for which a salary is paid, it is prohibited by said section. This section prohibits the holding by a member of the Legislature of any lucrative office or employment. The second sentence of said section would also prohibit the holding of such an office if compensation is received, since such an office would be employment and would, therefore, fall under that provision of the section.

Section 7797, Missouri Revised Statutes Annotated, relating to the members of the board of public works, provides that "each member of said board shall receive such salary and give such bond as may be prescribed by ordinance." This section reads as follows:

"Not more than two members of said board shall belong to the same political party, and its administration shall in all respects be entirely nonpartisan. Each member of said board shall receive such salary and give such bond as may be prescribed by ordinance."

July 9, 1945

We assume, therefore, that membership on said board would be a lucrative office or employment under the constitutional provisions quoted above.

If there is no compensation attached to the membership on the board of public works, it might be possible to construe Section 12 of Article III of the new Constitution as permitting a legislator to be a member of said board, since the provision in the first sentence thereof uses the word "lucrative" office or employment. We think it is not necessary to construe the provision as to this issue because of Section 7798, Missouri Revised Statutes Annotated, quoted above.

This section is applicable to the members of the board of public works of cities of the fourth class, in which classification the City of Bowling Green falls. It will be noticed that this section applies to nominations or appointments of members of the board of public works for any other office during their official terms, and does not specifically deal with situations where another office is held before appointment to the membership of the board of public works.

It is settled law in Missouri that a statute will not be construed so as to make an act of the Legislature a vain and useless one. *State v. Ball*, (Mo. App. 1943) 171 S. W. (2d) 787; *State ex rel. Mcallister v. Dunn*, (Mo. 1919) 209 S. W. 110. Statutes should be construed so as to give effect to the legislative intent. *State ex rel. Taylor v. Daues*, (1926) 281 S. W. 398, 313 Mo. 200; *Bassen v. Monckton*, (1925) 274 S. W. 404, 308 Mo. 641; *City of St. Louis v. James Broudis Coal Co.*, (Mo. App.) 137 S. W. (2d) 668. The letter of a statute must give way somewhat to its obvious intentment. *Rutter v. Carothers*, (1909) 122 S. W. 1056, 223 Mo. 631. The effect of a proposed interpretation of a law must be considered in ascertaining the legislative intent. *Straughan v. Meyers*, (1913) 137 S. W. 1159, 263 Mo. 580; *Bragg Road Dist. v. Johnson*, 20 S. W. (2d) 22, 323 Mo. 990. We must construe Section 7798, supra, in the light of these settled canons of statutory construction.

We think the purpose of the Legislature in enacting Section 7798, supra, was to prevent the holding by a member of the board of public works of any city of the fourth class of any other office during his official term. This purpose would

July 9, 1945

not be carried out and, we think, the statute would be rendered useless and of little effect in prohibiting the evil which it was intended to strike at, if its construction was limited only to cases where a member of the board accepted a nomination or appointment to another office during his official term. It would be illogical to suppose that the Legislature intended to prohibit the holding or the acquiring of another office by a member of the board and, in turn, did not intend also to prohibit the converse of this situation, namely, the appointment to the board of any person who was at that time holding another public office.

A well settled common law principle of statutory and constitutional construction is to the effect that a public officer is prohibited from holding two incompatible offices. The Missouri courts have held that where the duties are inconsistent, antagonistic, or conflicting, as where one office is subordinate to the other, they are incompatible. *State v. Grayston*, (1942) 163 S. W. (2d) 335. The legislative branch of the government is superior in a great many respects to all political subdivisions of the state or their agencies. We think, therefore, that the board of public works, broadly speaking, is a subordinate agency to the Legislature of the state. Such being the case, offices held by one person in both would, we think, be subject to the rule against holding incompatible offices.

CONCLUSION

It is, therefore, the opinion of this department that a member of the Legislature cannot, during the term of his office, be appointed to the Board of Public Works for the City of Bowling Green, Missouri.

Respectfully submitted,

Smith N. Crowe Jr.

SMITH N. CROWE, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:HR

SCHOOLS: Consolidated district not required to furnish transportation for elementary pupil assigned to a school in another county when such other school is within $3\frac{1}{2}$ miles of the pupil's home.

August 18, 1945



Hon. A. L. Luther
Prosecuting Attorney
Memphis, Missouri

Dear Sir:

This will acknowledge receipt of your letter in which you submitted the following for our opinion:

"The Bible Grove Consolidated School District No. 2 was formed in this county along about 1924 and all of the outlying elementary schools were closed with the exception of one which served pupils living more than $3\frac{1}{2}$ miles from the central school. This elementary school was operated for several years and when the attendance fell below 10 pupils the board of directors of the district closed the school. For a time pupils were transported to the central school building. Now the board of directors have intimated that these pupils living more than $3\frac{1}{2}$ miles from the consolidated school to be maintained, it being the only school to be in operation, are to be assigned to schools outside of the district which are less than $3\frac{1}{2}$ miles from the pupils and that there is no transportation to be provided to these assigned pupils. One of the pupils living within the consolidated district more than $3\frac{1}{2}$ miles for the consolidated school would be assigned to the nearest school which is a distance of 3 miles from the nearest school outside of the district.

Question: Is the statute mandatory that the assigning school, (Consolidated School District) pay transportation on this pupil?"

August 18, 1945

Section 10495, R. S. No. 1939 provides how a consolidated school district may be formed. Said section reads in part as follows:

"* * * The county superintendent of schools shall call a special meeting of all the qualified voters of the proposed consolidated district for considering the question of consolidation. He shall make this call by posting within the proposed district ten notices in public places, stating the place, time and purpose of such meeting. * * *"

Section 10496, about which you inquire, provides as follows:

"The question of transportation of pupils may be voted upon at the special meeting above provided for, if notice is given that such a vote will be taken. If transportation is not provided for in any school district formed under the provisions of sections 10493 to 10500, inclusive, it shall then be the duty of the board of directors to maintain an elementary school within three and one-half miles by the nearest traveled road of the home of every child of school age within said school district: Provided, transportation of pupils or the maintenance of elementary schools within three miles and a half of each child of school age in the district shall not be required in consolidated districts now or hereafter organized under the provisions of sections 10493 to 10500, inclusive, where such consolidation has not placed said children further from an elementary school than they were prior to said consolidation: Provided, however, no transportation shall be furnished if there be any school within three and one-half miles of such pupil but assignment shall be made as provided by Section 10461: Provided further, that when the average attendance in any elementary school for any month falls below ten, the school board shall have authority to close such elementary school for the remainder of the term and provide transportation for the pupils of such elementary school to some other elementary school or schools in said district."

August 18, 1945

We believe a fair interpretation of Section 10496, supra, is that it is the intention of the legislature that elementary pupils in a consolidated school district should either be provided a school within three and one-half miles of their home or that they should be transported to some school. The Section provides that if the consolidated district does not furnish transportation it is mandatory that the district "maintain an elementary school within three and one-half miles by the nearest traveled road of the home of every child of school age within said school district," except in the situations covered by the provisos in the section. The first proviso excuses the maintenance of transportation for pupils whom the consolidation has not placed further from an elementary school than they were prior to said consolidation. The second proviso excuses the maintenance of transportation for pupils who live within three and one-half miles of any school, and provides that in such case, assignment shall be made as provided by Section 10461. This latter proviso is designed to cover the situation outlined in your letter.

It should be noted that the second proviso of Section 10496 provides that:

"No transportation shall be furnished if there be any school within three and one-half miles of such pupil but assignment shall be made as provided by Section 10461."

Section 10461, referred to in said proviso reads as follows:

"Whenever any pupil is so located that an adjoining school is more accessible, the county superintendent shall have the power and it shall be his duty to assign such pupil to such adjoining district: Provided, if a school district shall be divided by a county line, or it is deemed advisable to assign pupils to a district in an adjoining county, then the county superintendent of the county wherein the pupil resides shall make the assignment, subject to an appeal to the state superintendent by any county superintendent whose county is affected, and the decision of the state superintendent shall be final: Provided, the attendance of such assigned pupil shall be credited for the purpose of apportionment of state funds to the district in which the student lives, and the board of directors of the district in which said student lives shall pay the tuition of such pupil or pupils so assigned: Provided, such tuition shall not exceed the pro rata cost of instruction."

August 18, 1945

It will be seen that by said section 10461, pupils can be assigned to schools in another county from that in which they reside. Nothing is said in said section about transporting such pupils to the school to which they are assigned, but said section does provide for paying the tuition of such assigned pupils. Said section 10461, therefore, provides a free school for such assigned pupils, but it leaves it up to the pupils to get to the school. Therefore, when Section 10496 provides that in a certain case assignment shall be made as provided by Section 10461, it does not require that said pupils be transported to the school to which they are assigned, but it only requires that their tuition be paid to such school.

CONCLUSION

It is, therefore, the opinion of this office that when an elementary pupil residing in a consolidated school district is assigned to a school in another county and such other school is within three and one-half miles of the home of such assigned pupil, it is not required nor mandatory that the sending district provide transportation for such assigned pupil.

Yours very truly,

HARRY H. KAY
Assistant Attorney General

APPROVED:

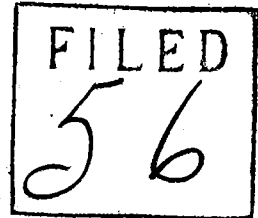
J. E. TAYLOR
Attorney General

HHK/vlv

PARTNERSHIPS, LIMITED: Corporations and limited partnerships may both use the word "limited" or its abbreviation at the end of the names under which they transact business.

May 1, 1945

5-9



Honorable Russell Maloney
Corporation Supervisor
Office of the Secretary of State
of Missouri
Jefferson City, Missouri

Dear Mr. Maloney:

Your letter of March 9, to General Taylor, requesting this Department to furnish your office with an opinion respecting the legality of the use of the word "limited" as a part of a fictitious name, by a limited partnership, or whether the use of the word "limited" is exclusive to corporations, has been received and assigned to the writer to prepare the opinion.

Your letter states:

"The question has been submitted to this department as to whether or not we should permit the registration of a fictitious name ending with the abbreviation of the word 'limited.'

"It is contended by applicant that as a limited partnership they are entitled to designate the partnership in such manner, and that the word 'limited' is not confined to the use of corporations as is not the word 'company'.

"We have refused the application because in our judgment the word 'limited' is for the exclusive use of a corporation even though it is not commonly used in this country."

May 1, 1945

47 C.J., Section 1008, page 1273, defines a "limited" partnership as follows:

"The term 'limited partnership' is a term sometimes used to designate joint adventures and partnerships limited only in respect of the nature and scope of the business to be carried on, and more loosely, to characterize business associations formed under statutes permitting the organization of partnership associations, the liability of whose members is limited to the amount contributed to their capital. A more accurate usage of the term confines it to the form of business association composed of one or more general partners and one or more special partners, the latter not being personally liable for the partnership debts."

Chapter 34, R.S. Mo. 1939, contains the statutory laws of Missouri on such partnerships under the title "Partnerships, Limited." This chapter is composed of Sections 5564 to 5576, both inclusive. Section 5564 of said chapter is as follows:

"Two or more persons may form a limited partnership, which shall consist of one or more persons of full age, called general partners, and also one or more persons of full age, who contributed in actual cash payments a specified sum as capital to the common stock, called special partners, for the transaction within this state of any lawful business, except insurance and banking, upon the terms and subject to the conditions and liabilities prescribed in this chapter."

Section 5569 of said Chapter is in part as follows:

"The business of such partnership shall be conducted under a firm name in which the name or names of some or all of the general partners only shall be inserted without the addition of the word 'company,' or any equivalent term, * * *"

May 1, 1945

Section 5570 is in part as follows:

"* * * The special partners shall not be liable for the debts of the partnership beyond the fund contributed by them respectively to the capital of the partnership."

Section 5576 of said chapter is as follows:

"Any partnership formed under this chapter shall keep in a conspicuous place at each of its places of business a plain and legible sign, giving the name and style of the firm, together with the names of all of the members of such partnership, designating which are general and which are special partners, and failure to obey this requirement shall make the special partners liable as general partners."

This subject is very clearly treated in 47 C. J. page 1290. The text there states:

"* * * However, many of the statutes expressly forbid the use of the word 'Company' or any other general or equivalent term in the firm name. Such a provision is obviously intended for the benefit of the public, and under it the use of a suffix, like 'and Company,' in the firm name is in direct violation of its requirements. * * *"

Indeed, it would seem that the only purpose the Legislature had in enacting legislation at all on the subject was for the protection of the public. Article 3, Chapter 140, R. S. Mo. 1939, constitutes the law of this State on the use and registration of fictitious names. That part of Section 15467 of said Article 3, Chapter 140, setting out what shall be contained in the statement to be permitted to register a fictitious name under which to transact business, is very similar in the language used to some of the language used in Section 5565, and Section 5576 of said Chapter 34 on "Partnerships, Limited." These statutes in the "fictitious names" article also appear very clearly to have the express intention in mind to protect the public.

With respect to the right to use a fictitious name,

May 1, 1945

45 C. J., page 376, states this rule:

" * * * Without abandoning his real name, a person may, in the absence of statutory prohibition, adopt any name, style, or signature, wholly different from his own name, by which he may transact business, execute contracts, issue negotiable paper, and sue or be sued, * * * * ."

Our St. Louis Court of Appeals in the case of Sheridan et al, vs. Nation, 159 Mo. App. 27, l.c. 43, on the same point says:

"* * * It is entirely settled, both by the elementary writers and adjudicated cases, that in the absence of fraud, a person may do business and execute contracts in any name he or she has chosen to assume and has a perfect right to sue and be sued in such name. * * * "

The Kansas City Court of Appeals in the case of Ditzell et al., vs. Shoecraft, 219 Mo. App. 436, l.c. 446, approving the same principle of law, said:

"It has been held that the right to do business is inherent in every person and partnership and in the absence of fraud, any name may be used. (Palmer v. Leivy (Mo. App.) 205 S.W. 244.) The powers of the Legislature are narrowly confined. It has power to regulate but not to prohibit business. * * * "

Our Supreme Court was considering and discussing the fictitious name statutes in the case of Kusnetsky vs. Insurance Company, 313 Mo. 143. The Court, l.c. 152, said:

"It is earnestly argued by counsel for appellants here that the statute is intended to prevent fraud. Exactly. The particular fraud in contemplation undoubtedly was the deception of persons dealing with any institution trading under a name other than the actual name of the owners. * * * "

May 1, 1945

Section 15467, R.S. Mo. 1939, does not preclude one from beginning a business of any sort under a fictitious name. It does provide that within five (5) days after engaging in or beginning such business he shall then register the fictitious name with the Secretary of State. There is no discretionary power given to the Secretary of State, nor are any discretionary duties placed upon him in any of the sections of said Article 3, respecting the registration of fictitious names. That the Legislature did not contemplate or intend that the Secretary of State should take any part in the selection of a fictitious name under which one would begin or carry on a business venture is self-evident, otherwise it would have been provided that one could not begin a business under a fictitious name without first having registered the name with the Secretary of State and obtained his approval of the name. On the other hand, the applicant for the registration of such business name is left free and unhampered to adopt any name he wishes to use for the purpose. He is only required to register the name within the period of five (5) days after engaging in such business. He must then only comply with the terms of said Section 15467, and produce the evidence that he has paid the registration fee, as prescribed by the following section, 15468. It then becomes the ministerial duty of the Secretary of State to register such fictitious name.

40 C. J. 1210 gives a definition of "ministerial duty" as follows:

"A ministerial duty has been variously defined as a duty in which nothing is left to discretion; * * * ."

The same volume on the same page under foot-note 23 (b) quoting a South Carolina case which clarifies the text definition above, says:

"A ministerial duty arises when an individual has such a legal interest in its performance that neglect of performance of such duty becomes a wrong to such individual. Morton v. Comptroller-Gen., 38 S.C. L. 450, 473."

46 C. J. 1032, in discussing the distinction between express and implied powers of public officers under the title of "officers" states the rule of such distinction as follows:

" * * * But no powers will be implied other than those which are necessary for

May 1, 1945

the effective exercise and discharge of the powers and duties expressly conferred and imposed, and where the mode of performance of ministerial duties is prescribed, no further power is implied."

The fictitious name statutes are mandatory and penal as far as the applicant for registering a fictitious name is concerned. It is compulsory that within five (5) days after beginning business he must register any fictitious name under which he is operating. If, for any time, after the elapse of five (5) days, he should conduct his business under a fictitious name without having registered the same with the Secretary of State, he would be, under the terms of Section 15469, guilty of a misdemeanor, and subject to a fine, or imprisonment, or both.

38 C. J. gives a very appropriate definition of "mandatory" as it may be applied to the terms of the statutes under consideration, page 956, where the text reads:

" * * * As an adjective (usually spelled mandatory), containing a command; imperative; peremptory; preceptive."

59 C.J., page 1110, in defining "penal statutes" uses this text:

" * * * In common use, however, this sense has been enlarged to include under the term 'penal statutes' all statutes which command or prohibit certain acts, and establish penalties for their violation, * * * ."

The same volume of the same work, pages 1127 and 1128, gives as examples of "penal statutes";

" * * * those which operate in restraint of * * * the exercise of any trade or occupation, or the conduct of business.
* * * "

Such mandatory and penal statutes must be strictly construed against the State, and liberally construed in favor of the individual, such as the applicant here, in the registration of a fictitious name. A case where this rule of strict construction was applied by our Supreme Court, was in the case of State ex rel. Spriggs vs. Robinson et al.,

May 1, 1945

State Board of Health, 253 Mo. 271. That was a case where the relator's license to practice medicine had been revoked. Of the statute being construed, under which the revocation of such license was effected, l.c. 284, 285, the Court said:

" * * * If remedial, it must be liberally construed in behalf of both respondents and appellant, while if it be a penal law, it must be strictly construed against the respondents, as the representatives of the State, and liberally construed in favor of appellant. (State v. Balch, 178 Mo. 392; State v. Kooch, 202 Mo. l.c. 235; State v. McMahon, 234 Mo. l.c. 614.)

"This rule is announced in 2 Lewis's Sutherland's Statutory Construction (2 Ed.), section 531.

"Among penal laws which must be strictly construed, those most obviously included are all such acts as in terms impose a fine or corporal punishment under sentence in State prosecutions, or forfeitures to the State as a punitive consequence of violating laws made for preservation of the peace and good order of society. But these are not the only penal laws which have to be so construed. There are to be included under that denomination also all acts which . . . take away or impair any privilege or right."

Webster's International Dictionary, page 2098, defines the word "register" as used in said Sections 15466 and 15467 in definition 1:

"To record formally and exactly, as for future use or service; to enroll, to enter precisely in a list or the like.

"2a. To secure or make an official entry of in a register; as, to register a will, a deed, a mortgage."

It would appear, under the above quoted authorities, that an applicant for registering a fictitious name for a "limited" partnership, there being nothing in our statutes prohibiting it, or giving the State the right to refuse its

May 1, 1945

use, would have the lawful right to use the word "limited", or its abbreviation as the last word in such fictitious name.

At least one of our States, the State of Pennsylvania, by a statute enacted many years ago, Section 5, Laws of Penna., 1874, page 272, required the word "limited" to be the last word in the name of every partnership association formed under their "Limited Partnership Statute." The provisions of the Pennsylvania statute have been somewhat changed and strengthened in that regard in later years. Sections 265 and 266, Title 59, pages 2655, 2656, Purdon's Penna. Statutes, 1936 Compact Edition, require the words "limited liability" to appear after the name of every partner in a "limited" partnership whose names appear in its signs or upon its stationery.

It is very probable that the appearance of the word "limited" in Section 7 of the Corporation Act of 1943, page 418, has caused the position to be taken that the word "limited" is exclusive to corporations, and that it may not be used by a "limited" partnership in its selection for registration and use of a fictitious name in its business. It is not believed that such a position is justified under the law. Section 7 of the new Corporation Act of 1943, page 418, states:

"The corporate name:

"(a) Shall contain the word 'corporation,' 'company,' 'incorporated,' or 'limited,' or shall end with an abbreviation of one of said words."

It is not seen that the use of the word "limited" could serve any possible office of identity of a corporation as such, or its name. Certainly, there is nothing in any part of this Act making the use of the word "limited" exclusive to corporations. Said Section, as quoted, requires the use of one of the words therein expressed in quotations. There could be no controversy that the use of the word "corporation," "company" or "incorporated," would fully and appropriately identify any organization as a corporation. That statute says that only one of the words, including "limited," shall be used, or the abbreviation of either of them at the end of the corporate name. But, suppose all of the other words, one only of which is permitted to be used, are eliminated, and only the word "limited" is used, such word would fail completely to identify the organization as a "corporation," whereas either of the others would do so. The word "limited" is not defined by said section, or elsewhere, in said Act. It would thus stand out as entirely meaningless in identifying the corporation as such, or in performing any other intelligible function.

May 1, 1945

Under our State Constitution, Section 7, Article 12, all corporations are "limited" in the extent and character of their businesses which they propose to operate. But neither by the Constitution nor by any statute are they given the exclusive right to use the word "limited."

The enactment of the "limited" partnership statutes and the fictitious names statutes of this State was and is a proper exercise, by the Legislatures which enacted them, of the police powers of the State for the prevention of fraud against the public. Here, if the word "limited" or its abbreviation, is used as the last word of a "limited" partnership, operating under a fictitious name, it would seem to be complying with both the spirit and the letter of both the "limited" partnership statutes and the "fictitious" name statutes to inform the public of the very nature of the partnership, so that the public, fully informed of the fact that it would be transacting business with a partnership, the names of some of the members of which are of "limited" financial responsibility and liability in the partnership's business, may protect itself.

To give Section 7, Laws 1943, page 418, as quoted, containing the word "limited" such construction as would confine its use to corporations only, and to exclude its use by "limited" partnerships, would have the effect of giving a corporation, without authority of law, a privilege over individuals, in violation of Section 3, Article XI of the new Constitution of Missouri, which is as follows:

"The exercise of the police power of the state shall never be * * * * * construed to permit corporations to infringe the equal rights of individuals, or the general well-being of the state."

Section 5, Article XII of the Constitution of 1875, recently repealed by the approval of the new Constitution of this State, was in almost the same language as our new Section 3, supra. The Supreme Court in the case of State vs. Railroad, 242 Mo. 339, had the meaning of this Section of said Article before it, and l.c. 355, said:

" * * * It was merely a constitutional declaration that the police power shall not be construed so as to exalt the rights of corporations above those of natural citizens or so as to disturb the general well-being of the State."

May 1, 1945

CONCLUSION.

Considering the above authorities, it is the opinion of this department that the use of the word "limited" or its abbreviation, as the last word of its corporate designation is not the exclusive privilege of corporations alone, but that it may be used in like manner by "limited partnerships" at the last of a fictitious name selected and registered by such partnership in the conduct of its business affairs.

Respectfully submitted,

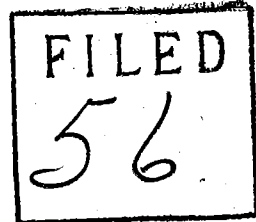
GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SHERIFFS: Can handle criminal cases in Justice Court and receive fees for services.

May 9, 1945.



Honorable Russell Mallett
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Mr. Mallett:

Your letter of May 7, 1945, to the Attorney General, requesting an opinion, has been handed to the writer for reply. Your letter of request is as follows:

"I have had considerable controversy between the Sheriff of Jasper County and the Constable of Galena Township, Jasper County, Mo. The Constable maintains that all Justice Court criminal work should be handled by him, and that the Sheriff is not entitled to mileage when he works out of a Justice Court.

"Joplin being in Galena Township causes most of the contention for the reason that the police officers pick up and prepare cases for most criminal cases that are filed in the County and whichever officer gets this business appreciates it, for there is little work connected with it. The Sheriff contends that since these cases are prepared by the Police Department, that he is entitled to half of them, even though most of them are handled through the Justice Courts at one stage or another.

"Please give me an opinion as to whether the Sheriff is entitled to handle criminal cases in the Justice Court, and if

so, whether he is entitled to fees for executing warrants and subpoenas and mileage in connection with the subpoenas and execution of warrants."

In your request are those two questions:

(1) Is the sheriff entitled to handle criminal cases in a Justice Court?

(2) If so, is he entitled to fees for executing warrants, subpoenas and mileage for serving same?

Section 3808, Chapter 30, Article 4, R. S. Mo. Anno., 1939, provides:

"Upon the filing of a complaint before a justice of the peace, verified by the oath or affirmation of a person competent to testify against the accused, if the justice be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged, it shall be his duty to forthwith forward such complaint to the prosecuting attorney; and it shall be the duty of the complainant to forthwith inform the prosecuting attorney what facts can be proved against the accused, and by what witnesses, and the residence of such witnesses; and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made, it shall be his duty to immediately file his information before the justice taking the complaint, and give to said justice a list of the witnesses to be subpoenaed on the part of the state; and upon the filing of the information by the prosecuting attorney, as herein provided, with the justice of the peace, or upon the filing of an information by the prosecuting attorney upon his own information

May 9, 1945

and belief, without complaint of a private individual having previously been filed, it shall be the duty of the justice to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff of the county or constable of the township, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the justice to execute the same, by written indorsement to that effect on such warrant."

Section 3809 of Chapter 30, Article 4, R. S. Mo. Anno., 1939, reads as follows:

"If any justice of the peace shall have personal knowledge that any affray or breach of the peace is about to be committed, he shall issue his warrant as is directed in the preceding section; and if any such offense is committed, threatened or attempted in his presence, he shall immediately arrest the offender, or cause it to be done; and for this purpose no warrant or process shall be necessary, but the justice may summon to his assistance any sheriff, coroner or constable, and all other persons there present, whose duty it shall be to aid the justice in preserving the peace, arresting and securing the offenders, and all such as obstruct or prevent the justice or any of his assistants in the performance of their duties."

Section 13411, Chapter 99, Article 2, R. S. Mo. 1939, provides:

"Fees of sheriffs shall be allowed for their services as follows:

* * * * *

"For serving every summons or original writ and returning the same for each defendant 1.00

May 9, 1945

* * * * *

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip . \$0.10

* * * * *

"For summoning each witness50
 "For return of non est on a subpoena25

* * * * *

We are unable to find any law indicating a division of the service of warrants in criminal cases in the Justice Court between a sheriff and constable. In view of the fact that either the constable or the sheriff can serve such warrants as are directed to him, it would appear that the Justice of the Peace can assign as many of the same as he may choose to either officer. Neither officer is entitled to demand any particular amount or number of said warrants.

Conclusion

In view of the foregoing, it is the opinion of this Department that a sheriff may serve warrants in a criminal case, which are directed to him by a Justice of the Peace, and also serve subpoenas in criminal cases in a Justice of the Peace Court, and that he is entitled to fees and mileage for such service.

Respectfully submitted,

GORDON P. WEIR
 Assistant Attorney General

APPROVED:

J. E. TAYLOR
 Attorney General

GPW:EG

AUTOMOBILES: Criminal liability of innocent purchaser of an automobile through forged transfer of certificate of title.

January 31, 1945

FILED

57

Mr. W. V. Mayse
Prosecuting Attorney
Bethany, Missouri

Dear Sir:

Under separate cover, you were mailed the book of informations which you asked for in your letter of January 25, 1945.

In this letter you asked for an opinion as to the criminal liability of an innocent purchaser of an automobile through a forged transfer of the certificate of title, under Section 8382, R. S. Missouri, 1939, and state the following facts:

"(A) owns an automobile and has the title to the same, registered in his name. (B) gets possession of the title or deed without the knowledge of (A) and induces (C) to forge (A's) name on the back of the car title or deed purporting to transfer ownership of the car to (D) an innocent purchaser who does not know that the title which he purchased was a forgery.

"I have in mind that (D) himself may be punished criminally under the provision of our motor vehicle law."

This act is designed for the protection of the public to prevent traffic in stolen automobiles, and since the purchaser was not a party to the forgery and

Mr. W. V. Mayse

-2-

January 31, 1945

was innocent as to all elements of the forgery, he could not be prosecuted for his act. Evens v. Home Insurance Company of New York, 82 S. W. (2d) 111, 231 Mo. App. 1017.

CONCLUSION

It is the opinion of this department, under the facts stated, that there could not be a prosecution of the purchaser in this matter.

Respectfully submitted

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

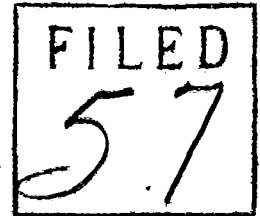
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COUNTY COURTS:
SCHOOLS:

County court cannot borrow county school fund.

February 6, 1945

2/6



Mr. Gordon J. Massey
Prosecuting Attorney
Ozark, Missouri

Dear Sir:

We have your letter of recent date, which reads as follows:

"We have a surplus of money in the Capital School fund which, under present conditions, the court has not been able to loan.

"Please advise whether or not the county court can set aside this money to the general revenue and use it to pay current expenses, repaying the amount borrowed say with 3% interest when the taxes are collected.

"Such a procedure if permitted will save the county money, make the capital school fund a little and do no harm."

The courts of this state have always treated the county school fund as a trust fund and have laid down the rule that in dealing such such fund county courts can only act as the statutes provide. In *Montgomery County v. Auchley*, 103 Mo. 492, the court said, l. c. 502:

" * * * The solution of this question will depend largely upon the power of the county courts in regard to school funds. That they are simply trustees of these funds will

not be disputed. All powers they possess in regard to them are derived from the statutes. * * * "

Likewise, in *Morrow v. Pike County*, 189 Mo. 610, 622, the court, in discussing the county school fund, said:

" * * * It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the lawmaking power in relation to the fund (*Ray County to use v. Bentley*, 49 Mo., l. c. 242); it may not divert the general county revenue to its protection, and, on the other hand, it can not apply the school fund to the payment of ordinary county debts. * * * "

See, also, *Ray County v. Bentley*, 49 Mo. 236.

Furthermore, Section 8, Article XI, of the Constitution, which said section was adopted by the people at the November election, 1944, after providing for the creation of the county school fund, provides that said fund "shall belong to the several counties as a county public school fund to be invested, used or disbursed for free public school purposes in the respective counties in such manner and at such times as the General Assembly shall by law provide."

It is apparent, therefore, that we must look to the statutes to see how the county court can handle and manage the said county school fund.

Section 10376, page 880, Laws of 1943, provides as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than three per cent per annum on unencumbered real

estate security, worth at all times at least double the sum loaned, with personal security in addition thereto, the proceeds of all moneys, stocks, bonds, and other property belonging to the county school fund; * * *

Section 10378, R. S. Mo. 1939, provides that the county school fund shall be invested in the same manner and under the same restrictions as township school funds are invested.

Section 10384, page 881, Laws of 1943, provides how township school funds shall be invested, and it provides that:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, with personal security in addition thereto; * * *

Sections 10384A, 10384B and 10385, page 881, Laws of 1943, set out the detailed steps to be followed by the county courts in making loans of such township funds.

Nothing is found in the statutes which authorizes the county court to borrow the county school fund by transferring it temporarily to the general revenue fund of the county. The reason the statutes limit the manner of loaning such funds to loans upon real estate security is no doubt due to the fact that prior to the general election on November 7, 1944, the Constitution of Missouri prevented the loaning of such funds in any other manner.

Section 10, Article XI, of the Constitution of Missouri read as follows:

"All county school funds shall be loaned only upon unencumbered real estate security

February 6, 1945

of double the value of the loan, with personal security in addition thereto."

Said section 10 was repealed by the people at the general election on November 7, 1944, and Section 8, Article XI, supra, was adopted. While the Constitution does not now limit the investing of the county school fund to real estate loans, yet it does provide that such fund shall be invested in such manner as the General Assembly shall direct. The only directions the General Assembly has made are contained in the statutes above referred to.

CONCLUSION

It is, therefore, the opinion of this department that a county court cannot borrow for, or set aside to, the general revenue fund of such county any part of the county school fund and use it to pay current expenses, even though the county court contemplates paying interest for the use of such fund.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

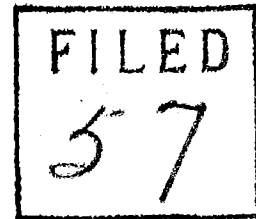
HHK:HR

INDIGENT INSANE

INMATE OF COUNTY FARMS:

County Court cannot recover
for maintenance of such person
as such inmate.

March 27, 1945



Honorable W. V. Mayse
Prosecuting Attorney of Harrison County
Bethany, Missouri

Dear Mr. Mayse:

Your letter of March 16, 1945 to General Taylor requesting an opinion from this Department respecting a claim by Harrison County against the estate of an insane person, for the maintenance of such person at the Harrison County Home, has been received, and assigned to the writer to prepare the opinion.

Your letter states:

"I would like to get an official opinion from the Attorney General's office on the question presented by the following statement of facts."

"In January of 1940 a resident of our County was admitted to our County Farm and this person in 1942 was adjudged of unsound mind by our Probate Court and on August 10, 1942 our Public Administrator of the County was appointed by the Probate Court as guardian of the person and estate of this person. Notice of this appointment was duly published in our County newspapers according to the statute. At the time a guardian was appointed it was discovered that she had a little over \$700.00 in monies and bonds. This person of unsound mind continued to be cared for at our County

Farm at the County's expense. The County continued to pay this expense until July 1944. At that time my predecessor in office filed a demand against the estate for all the monies expended by the county for the care and keep of this person of unsound mind, from the time she first entered our County Farm in 1940 right straight through."

"I have been unable to find cases that construe clearly to me the application. Section 500 and 471 R. S. of 1939--the latter being of course a statute of limitation."

"Now with these facts in mind you can readily see the issues presented by failure of the County to file a demand against the estate of this person of unsound mind within one year after publication of notice of the appointment of guardian. Does it bar the county from successfully maintaining such demand, or is the estate of this poor person, in spite of the statute of limitation 471, liable in full for monies expended by the County for her support and care from 1940-1944. By the way of statement of additional facts, this person of unsound mind is still living."

It is said in the statement of facts in the request for this opinion that the insane person referred to was an inmate of the County Farm Home of Harrison County as a poor person until July, 1944.

Section 9593, Article 3, Chapter 55, R. S. Mo. 1939, under the subject of "County court to provide for the support of the poor." states:

"The county court of each county, on

the knowledge of the judges of such tribunal, or any of them, or on the information of any justice of the peace of the county in which any person entitled to the benefit of the provisions of this article resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

The statement of facts also states that this person was still maintained as a County poor person or pauper until July, 1944, notwithstanding she was so adjudged to be of unsound mind on August 10, 1942.

Section 500, Article 18, Chapter 1, R. S. Mo. 1939 under the title of "Administration" states:

"In all cases of appropriation out of the county treasury for the support and maintenance or confinement of any insane person, the amount thereof may be recovered by the county from any person who, by law, is bound to provide for the support and maintenance of such person, if there be any of sufficient ability to pay the same, and also the county may recover the amount of said appropriations from the estate of such insane person."

Said section 500 dealing solely with "insane persons," itself eliminates its terms and conditions from applying to the claim in this case prior to August 10, 1942. This person was not an "insane person," according to the facts as stated, until August 10, 1942.

Monies expended for the maintenance of its poor cannot be recovered by a County. This has been announced by the Supreme Court and the Courts of Appeals of Missouri in numerous cases. This was the holding in the case of

Chariton County v. Hartman, 190 Mo., page 71, l.c. 76 and 77, quoting Montgomery County v. Gupton, 139 Mo. l.c. 308 where it is said:

"* * * It is well settled at common law that the provision made by law for the support of the poor is a charitable provision, from which no implication of a promise to repay arises, and moneys so expended cannot be recovered of the pauper, in the absence of fraud, without a special contract for repayment. (Citing cases.) A person so relieved, whether he had or had not property, never was liable to an action for such relief at common law. * * *."

The case of Montgomery County v. Gupton, supra, on this point is cited with approval in numerous cases both by the Supreme Court and other Courts of Appeals.

The case of St. Louis v. Hollrah et al. 175 Mo. page 79 was a case where the City of St. Louis sued the estate of an insane person for appropriations for necessities furnished for maintenance and support of such person in a hospital for insane persons. The Court held the City could recover.

It appears, upon reading the Hollrah case, that the claim might have been defeated had the defense been made that the person involved was an insane pauper. But such defense was not made. The Supreme Court in mentioning the case of Montgomery County v. Gupton, supra, in the Hollrah case, l. c. 85, said:

"It is next contended that under the ruling in Montgomery County v. Gupton, 139 Mo. 303, no recovery can be had in this case if the necessities were furnished to Mrs. Hollrah as an insane pauper, and that the petition fails to state a cause of action in that it

does not negative that fact. This proposition answers itself. If such was the fact, it was matter of defense, and should have been so pleaded by the guardian."

The Court thereby, in effect, held that if it were a fact that the person was an insane pauper that that defense could have prevailed, had it been pleaded. It is apparent then that no recovery may be had by Harrison County against the estate of this person prior to the 10th day of August, 1942, the date of the establishment of her guardianship.

The question then is, may the County recover for support and maintenance of the County ward after that date and up to July, 1944, after which time the County has paid no expenses for her at the County Farm, as it appears.

According to the statement of facts here, this person was an inmate of the County Farm as a poor person from sometime in 1940 to July, 1944, and was maintained as such, at the County Farm as a mere incident to the County Court of Harrison County providing for the maintenance of the County Farm itself. Article 3, Chapter 55, R. S. Mo., 1939, in sections 9597 and 9601 thereof, contains provisions for the support of County Homes and Farms. Apparently the County Court of Harrison County had no intention of charging this person for her maintenance as an inmate of the County Farm even after she was declared to be of unsound mind, or until after July 1944, when it terminated such support. In order to recover any sum from the estate of this person, now in the hands of her guardian, Harrison County must bring itself within the terms of some statute permitting the County to so recover. As we have seen from the cases before cited the County has no common law right to collect from this person.

Section 9334, R. S. Mo., 1939 requiring counties to support indigent insane persons in State Hospitals for the insane is as follows:

"The superintendent shall, under the direction of the managers, cause, once in every six months, to be made out and forwarded to any county

court which may send to a state hospital an insane poor person, an exact account of the sum due and owing by such court on account of such insane person. Said court, at its first session thereafter, shall proceed to allow, and cause to be paid over to the treasurer of such state hospital, the amount of said account."

The Supreme Court of this State had this exact question before it in the case of Audrain County v. Muir 249 S. W. 383. This case distinguishes between the rights of a county and an individual with respect to recovery of necessities where the person was an indigent insane person. The Court, in construing as it then stood what is now Section 500, R. S. Mo. 1939, held that while an individual might recover for necessities furnished, a County could not do so unless it brought itself strictly within the terms of such statute. On this question, l. o. 385 and 386, the Court said:

"The provision made by law for the support of poor or indigent insane is devolved by the statute upon the counties of which they are inhabitants. Cox v. Osage County, 103 Mo. 385, 15 S. W. 763; Montgomery County v. Gupton, 139 Mo. loc. cit. 308, 39 S. W. 447, 40 S. W. 1094; Chariton County v. Hartman, 190 Mo. loc. cit. 76, 77, 88, S. W. 617. It is well settled at common law that the provision made by law for the support of the insane poor by the county is a charitable provision, 'from which no implication of a promise to pay arises,' in the absence of fraud, without a special contract for repayment. Chariton County v. Hartman, supra; Montgomery County v. Gupton, supra.

"So that, in order to recover in this case, the plaintiff must bring itself within the statutory provision and

show that defendant was 'bound to provide' for his wife's support and maintenance, and was of 'sufficient ability to pay the same.'"

"There is no doubt that at common law 'food, clothing, shelter and medical attention and such things as every one must have,' are absolute necessities, which the husband, as long as he and his wife are living together as husband and wife, is bound and under legal obligations to supply to his wife, especially if she has no property or estate of her own, and is unable to supply such necessities herself. * * *."

Prior to 1927 a County had no right to collect from the estate of an indigent insane person, the appropriations made for their maintenance in a State Hospital for the insane. The Legislature of this State in 1927 did amend what is now our Section 500, R. S. Mo. 1939, to permit such recovery against the estate of insane persons. It will be observed, by reading said section 500, that the amendment permitting a County to recover the amount of said appropriations from the estate of such insane persons refers to the actual formal appropriations out of the County Treasury for the support of such insane persons as is stated in the first clause of said section. Section 9334, supra, requires such appropriations to be calculated to the penny. Apparently there was no actual appropriations for maintenance of the subject of this controversy while she was an inmate of the County Farm of Harrison County. There is no intention of the Legislature expressed in the terms of said Section 500 to warrant recovery for maintenance of insane inmates of County Farms by the amendment of 1927. It only applies to persons who may be confined in State Hospitals for the insane. The provisions of Section 500 have been before the Supreme Court and Courts of Appeals for construction in many cases since the amendment of 1927. All of those cases were suits to recover definite appropriations for persons maintained at State Hospitals for the insane.

The case of Barry County v. Glass, 160 S.W. (2d) 808 is a fair example of those cases. That case holds that the estate of an insane person is liable for appropriations made for the maintenance of such person in a State Hospital and recognizes the rule that there must be express authority by statute before a County may recover for maintenance furnished an insane pauper. Our Springfield Court of Appeals, in pointing out the syllabi in paragraphs one and two in the Gupton case, so stating, 1. c. 809 and 810 in the Glass case:

"* * * The same provision is contained in Section 501, R. S. 1929, and that provision was in full force and effect when Glass was confined in the State Hospital at Nevada, Missouri, as a county indigent patient, and, under that section, the estate of Charles W. Glass, an insane person, was clearly liable for the money previously paid out by Barry County."

* * * * *

"Plaintiff in error cites Montgomery County v. Gupton, 139 Mo. 303, 39 S. W. 447. All we need to say of the case cited is that it was decided in 1897 and before the Statute was amended so as to give the county a demand or claim against the estate of the insane person. What the Supreme Court held in that case, is well shown in paragraphs 1 and 2 of the syllabi of the 39 S. W. at page 447. The 1927 amendment, Laws 1927, p. 98, R. S. 1939, Sec. 500, supplied the very defect pointed out in the Gupton case. * * *."

In the case of Jones v. Norton, 60 N. W. page 200, the precise question presented here, whether the estate of an insane pauper was liable for maintenance at a County Home or Farm as distinguished from the liability for "any sums paid by the County" for the maintenance of such person in a State Hospital for the insane, was before the Supreme

Court of Iowa. The statutes of the State of Iowa, respecting both the maintenance of insane poor persons in County Homes or Farms and in State Hospitals for the insane, are very similiar to our respective sections 9593 and 500, R. S. Mo. 1939. Our section 500, in defining the liability of the estate of such person to a County, says that it shall be for "the amount of said appropriations." The Iowa statute says the measure of recovery against the estate of an insane person, in distinguishing between liability under that statute and non-liability under the pauper statute, shall be for "any sums paid by the County in their behalf as herein provided." The case recites and gives the provisions of its said respective statutes, and in holding that the statute mentions "any sums paid" referred only to definite sums paid for insane persons in State Hospitals, just as our section 500 provides for the recovery of "said appropriations," and that recovery could be had for such "sums paid," for maintenance at a State Hospital for the insane, and in holding that no recovery under that section could be had against the estate of an insane poor person, the court in l.c. 201, N. W. 60, said:

"* * * The further provisions do create a liability to the county, not for support furnished at the county poor-house, but for 'any sums paid by the county in their behalf as herein provided.' What follows shows that the sums 'herein provided' refer to sums paid for treatment and support in the state hospital. It is 'sums paid' that are recoverable, not the value of 'board and lodging, care, medicine, and medical attendance,' as claimed in this case. * * *."

It is held in several cases decided by our Supreme Court and Courts of Appeals that a common law liability to pay money exists against the estate of an insane person for necessities. These cases all, except the Hollrah case, supra, were cases where an individual furnished the necessities for an insane person. The Hollrah case itself, as above cited and discussed, holds

that had the defense been made that the maintenance was furnished to an insane poor person by the St. Louis Hospital, it would have been a valid and perhaps sufficient defense to defeat recovery. Cases so holding that there is an implied agreement under the common law to pay for such necessities by the estate of an insane person are, *Took v. Took*, 120 S. W. (2d) 168, Chariton County v. Hartman, 190 Mo., page 71, l. c. 76 and 77, Audrain County v. Muir, 249 S. W. 383, l.c. 385 and 386, and *Reando v. Misplay*, 90 Mo. 251. For the sake of brevity, the text of these cases will not be quoted except in the last case cited. The *Reando v. Misplay* case is typical of the rule stated and at l. c. 258 says:

"* * * If necessities are furnished a person in this condition, in good faith, and under circumstances justifying their being so furnished, the person furnishing may recover. If the law were not so, the insane might perish, if a guardian having means should neglect or refuse to furnish the supplies needed for their support. They stand in the same position as minors, and are liable for necessities. * * * The estate of the insane is legally, as well as equitably, liable for necessities furnished in good faith and under circumstances justifying their being furnished."

From the above authorities it appears to be conclusive that our section 500, R. S. Mo. 1939 does not furnish authority to recover for maintenance of a person who is an inmate of a County Home or County Farm; that said section applies only to the recovery for definite appropriations made as such, under section 9328, Article 2, Chapter 51, R. S. Mo. 1939, for the maintenance of indigent insane persons in State Hospitals; and that such means as were used by Harrison County for the maintenance of this person in the County Farm are not recoverable because they were charitable in their purpose and application and for

which Harrison County has no statutory or implied right to recover.

CONCLUSION

It is, therefore, the Opinion of this Department that under the facts stated in the letter requesting this Opinion, and under the authorities cited, the estate of the person referred to, as being of unsound mind, is not liable to Harrison County, Missouri for her maintenance at the County Farm at any of the times named.

Respectfully submitted,

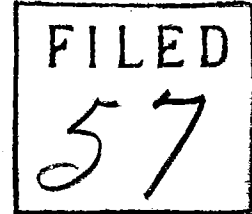
GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CRIMINAL COSTS: State remains primarily liable for fees of its own witnesses even though judgment may be rendered against defendant for costs.

May 15, 1945



Honorable G. Logan Marr
Prosecuting Attorney
Versailles, Missouri

Dear Mr. Marr:

Recently you wrote this office requesting that an opinion rendered January 17, 1936, to Honorable Forrest Smith, State Auditor, on the subject of criminal costs, be revised. For convenience, your letter is herein set out:

"The criminal cost clerk, Mr. Peters, of the State Auditor's Department, sent me a copy of an opinion that you gave the State Auditor on Jan. 17, 1936, concerning the payment of the witness fees of State witnesses, by the State, when a continuance is granted on the application of the defendant, and the defendant is convicted of the charge. I am urgently requesting at this time that you revise that old opinion at this time, especially the last part that states that even if there was no judgment for costs against the defendant for the costs made, at the time the case was continued on the application of the defendant.

"In this cause, \$173.00 was knocked out of a fee bill to the State in the case of State vs. Orville Purl, because costs for the state witnesses were made at a term at which term the defendant was granted a continuance on the application of the defendant. The defendant is a

May 15, 1945

pauper, and is now confined in the pen on a 20 year sentence. The witnesses for the state are doomed to lose their witness fees unless the State pays them.

"According to sections 4220, 4221, 4224 and 4225, R. S. Mo. 1939, and other criminal cost section provide that if the defendant is unable to pay, then in certain instances the state or the county or the complaining witness shall pay. And in every case possible judgment for cost is taken against the defendant, if he is convicted; so as to be sure and make the costs out of him if he is worth it. But, if the defendant is a pauper and unable to pay, then the state or county pays the costs, as the case may be. It seems to me that it has always been the rule of the thumb that the defendant was penalized with the costs, if he was convicted, but he was not worth the costs, then the state or county paid.

"Now as my second proposition, I want to say that the opinion quotes State vs. Brigham, 63 Mo. 258 and State ex rel. Gordon, 254 Mo. 471, 162 S. W. 629, and in those cases there was a judgment for costs against the defendant or the state, and the judgment for costs was entered of record. To the same effect see State ex rel. v. Buchanan, 41 Mo. 254 and also 63 Mo. App. 535. In those cases the Court took time out and actually assessed the costs against the party at whose instances the continuance was granted. In most every cause, in order to enforce any kind of rights either pro or con, there must be a judgment, a formal judgment of record, entered of record, and with the essential parts of a judgment.

"In this case of State vs. Orville Purl, from Morgan County, there was no judgment for costs of any kind assessed and set

May 15, 1945

up in the record against the defendant, because of the continuance granted to him in a criminal action, in which case he was convicted of a felony and sentenced to the State Penitentiary.

"And even if there was a judgment for costs, as I stated, he is not worth a judgment. But the point I am making and urging now is that in the absence of a judgment against him for costs, the costs of the witnesses for the State could not be collected if the defendant was worth a judgment for costs.

"For instance, there must be an adjudication for the costs, and the same a matter of a judgment in the record, if the witnesses are to prevail. In 118 Mo. App. 15, 93 S. W. 295, the facts show that a prosecution was dropped, and the costs that had accrued were taxed up against a complaining witness. In an effort to revive a purported judgment, he fought the case, because the judgment was just a memorandum that the complaining witness should pay the costs of the prosecution when there were no charges filed, but no formal judgment, with all its essential parts in the record. The alleged judgment was not allowed. So this shows that there can be no judgment for costs, unless the record is a formal judgment in favor of some party, and against some party, and for some amount.

"And in support of a change of this opinion, I want to urge that it was no fault of the State, the officers of the State, the prosecuting attorneys, or the witnesses for the State, that they came long miles and long distances for a trial, and then a continuance was granted to the defendant. It should be no fault of the witnesses for the state, that they lost their time, mileage and expenses, just because the

defendant was able to force through a continuance. It just adds another handicap to the state. It just makes it even harder to get witnesses for the state to come to court."

As pointed out by you, the cases of State ex rel. v. Gordon, 254 Mo. 471 and State v. Brigham, 63 Mo. 258, treat situations where a judgment had been entered for costs.

Originally each party to a suit was liable for his own costs, regardless of the result of the litigation. By judgment and statute the costs of the winning party may be charged to the losing party. The sections of the statutes pertinent to your questions are here set out.

Section 4220, R. S. Mo. 1939:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Section 4221, R. S. Mo. 1939:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and

May 15, 1945

lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each jurymen and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Section 4042, R. S. Mo. 1939;

"Continuances may be granted to either party in criminal cases for good cause shown, and the court may postpone the trial of any such case for good and sufficient reasons, of its own motion. When a continuance is allowed on the application of either party, it shall be at the costs of the party at whose instance it is granted, unless the court otherwise direct."

As pointed out in the case of State ex rel. v. Gordon, 254 Mo. 471, Sections 4220 and 4221, supra, are general and apply when there is no special section governing. Section 4042, supra, contains a special provision relating to the charge of costs against the party applying for a continuance.

The case of State v. French et al., 118 Mo. App. 15, cited by you, is of no assistance for the substance of that holding is that a docket entry is not a judgment and cannot be enforced.

What you say about the danger of the state's witnesses losing their fees is regrettable if the opinion is correct but that should not affect our interpretation of the law, neither should the fact that the state's officers did not occasion the delay. If the interpretation of the law produces this result, then the law should be amended.

As previously pointed out, each party to a suit is primarily liable for his own costs and this liability remains although the prevailing party secures judgment for costs against the losing party. C. J. S., Vol. 20, Sec. 109, page 352.

May 15, 1945

Section 4221, supra, requires the State to pay the costs when the defendant is convicted and sentenced to the Penitentiary, if the costs cannot be recovered from the defendant, except costs incurred on behalf of the defendant. Section 4042, supra, provides authority for charging the cost of a continuance to the party asking the continuance unless otherwise directed by the court. However, this section does not relieve the State from the duty to pay the costs of its own witnesses if such costs cannot be recovered from the defendant.

Conclusion

It is, therefore, the conclusion of this office that the costs of a continuance granted upon the application of a defendant should be charged to the defendant. However, this does not relieve the State of the duty to pay the fees of its own witnesses for being present in court when the continuance was granted, when such fees cannot be recovered from the defendant who applied for the continuance.

It is the further opinion of this department that the conclusion of the opinion written January 17, 1936, directed to Honorable Forrest Smith, State Auditor, is erroneous in so far as it undertakes to hold that the State is relieved from paying the fees of its own witnesses which have been charged to a defendant by reason of his applying for a continuance, but which cannot be recovered from the defendant due to his insolvency; and it is the further opinion that such previous opinion should be overruled to that extent and withdrawn.

It is further the opinion of this office that upon a proper showing that fees of state's witnesses, charged to defendant by reason of a continuance granted upon his application, cannot be recovered from the defendant, that the State should pay such fees.

Respectfully submitted,

APPROVED:

W. O. JACKSON
Assistant Attorney General

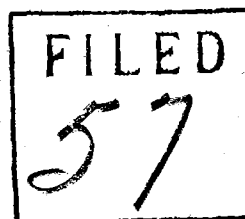
J. E. TAYLOR
Attorney General

WOJ:EG

CORONER: Re: The Coroner is not entitled to mileage under the statute and taxi fare for travel too.

August 28, 1945

9/5



Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

In a letter dated August 22, 1945, you requested an opinion of this department, writing as follows:

"A man killed his wife, then killed himself, and the coroner was called by a brother of the slain man. The coroner did not have a car and hired a taxi to take him to the scene of the homicide and suicide. He viewed the bodies, and made out a necessary death certificate, which in turn became the basis for a burial certificate.

"Then under section 13251-1939, the coroner certified his fee bill to the county, and in said fee bill was included \$5.00 for viewing the two bodies, and \$4.42 for mileage, and also, \$5.40 for taxi fare.

"The county court requests an opinion as to whether the county court is liable for the \$5.40 taxi cab fare?

"It is the contention of the court that even under either of section 13251, 13252 and 13253, of the 1939 statutes, the county is not liable for any taxi fares.

"The coroner, states that those named section provides for fees, costs, and expenses of the coroner. The coroner says that section 13424-1939, provides for his fees, and probably the costs of any inquest hearings, if had, but

August 28, 1945

that the same does not cover expenses. He says that expenses means, his expenses other than his actual fees and mileage, and that taxi fare is expenses. He states that the 8¢ per mile does not cover any travel cost, to him.

"What does expenses mean? Does that mean taxi fare herein? Should the county court also pay the mileage of 8¢ per mile."

As we read your letter, the question is one of whether the coroner is entitled to reimbursement for travel expenses to and from inquest hearings in an amount greater than the .08¢ per-mile which is allowed him under section 13424, R. S. Mo. 1939. For a determination of this question we examine the pertinent sections of the statute regarding the costs and fees of a coroner. Section 13424, reads as follows:

"Coroners shall be allowed fees for their services as follows: Provided, that when persons come to their death at the same time or by the same casualty, fees shall only be paid as for one examination:

| | |
|---|--------|
| "For the view of a dead body----- | \$5.00 |
| For issuing a warrant summoning each jury of inquest--- | .75 |
| For swearing each jury----- | .50 |
| For each subpoena for witnesses (all names to be put in one subpoena if possible)----- | .25 |
| For taking each recognizance (all names to be put in one recognizance)----- | .75 |
| For going from his residence to the place of viewing a dead body and return, each mile----- | .08 |

"The above fees, together with the fees allowed jurors, constables and witnesses, in all inquests, shall be paid out of the county treasury as other demands. For performing the duties of sheriff, the coroners shall be entitled to the same fees as are for the time being allowed to sheriffs for the same services. R. S. 1929, Sec. 11802."

Section 13251, R. S. Mo. 1939, reads as follows:

"The coroner or other office holding an inquest

as provided for by this chapter, shall present to the county court a certified statement of all the costs and expenses of said inquest, including his own fees, the fees of jurors, witnesses, constables and others entitled to fees for which the county is liable; and the county court shall audit and allow the same, and shall make a certified copy of the same, without delay, and deliver such copy to the county treasurer, which copy shall be deemed a sufficient warrant or order on the treasurer for the payment of the fees therein specified to each person entitled to such fees. The county treasurer shall pay to each person on demand, or to his legal representatives, the fees to which he is thus entitled, and shall take the proper receipt therefor, and produce the same in his settlements with the county court as vouchers for the money so paid out by him. R. S. 1929, Sec. 11632."

An examination of section 13251, supra, shows, we think, that the costs and expenses to which the coroner is entitled and which he must certify to the County Court under that statute, are the fees to which he is entitled under section 13424. The section states that the certified copy of such expenses "shall be deemed a sufficient warrant or order on the treasurer for the payment of the fees therein specified to each person entitled to such fees." The statute says the County Treasurer shall pay each person "the fees to which he is thus entitled." The statute thus used the word "fees" twice in describing or referring to the costs and expenses.

The entire statute must be considered in determining the meaning of any portion thereof and, the primary rule of construction of statutes is to ascertain the law-maker's intent. (De Jarnett v. Tickameyer, 40 S. W. (2d) 686; City of St. Louis v. Pope, 126 S. W. (2d) 1201; Artophone v. Coale, 133 S. W. (2d) 343; American Bridge Co. v. Smith, 179 S. W. (2d) 12; Bowers v. Public Service Commission, 41 S. W. (2d) 810, 328 Mo. 770; Missouri Mutual Co. 62 S. W. (2d) 1058.

We think the use of the word "fees" specifically indicates the intent of the Legislature that the only costs allowable to the coroner shall be those which are allowable as fees. Section 13424,

August 28, 1945

supra, sets out the fees to which the coroner is entitled and, we think, he is entitled only to the allowance authorized by that section.

This conclusion in itself would preclude the allowance to the coroner of more than the .08¢ per-mile provided by the statute for traveling expenses. However, we think there is another equally persuasive reason for arriving at such a result. This reason is contained in the legal definition of the word "mileage." Mileage is the allowance for traveling expenses at a certain rate per-mile.

United States v. Smith (1895) 158 U.S. 346;
Collins v. Riley (1944 Colo.) 152 P. (2d) 169;
Steenson v. Wallace (1936 Kan.) 62 P. (2d) 907;
Caswell v. New York Cent. R.R. Co. (1933 Mich.) 248 N.W. 641;
State v. Calusen (1927 Wash.) 253 P. 805;
Richardson v. State (1902 Ohio) 63 N.E. 593.

In United States v. Smith, supra, the Supreme Court of the United States said, l.o. 349,350:

"1. The first item relates to the allowance of the claim for mileage. While an allowance for travel fees or mileage is, by section 823, included in the fee bill, we think it was not intended as a compensation to a district attorney for services performed, but rather as a reimbursement for expenses incurred, or presumed to be incurred, in travelling from his residence to the place of holding court, or to the office of the judge or commissioner. The allowance of mileage to officers of the United States, particularly in the military and naval service, when travelling in the service of the government, is fixed at an arbitrary sum, not only on account of the difficulty of auditing the petty items which constitute the bulk of travelling expenses, but for the reason that officers travel in different styles; and expenses, which in one case might seem entirely reasonable, might in another be deemed to be unreasonable. There are different standards of travelling as of living, and while the mileage in one case may more than cover the actual expenses

in another it may fall short of it. It would be obviously unjust to allow one officer a certain sum for travelling from New York to Chicago, and another double that sum, and yet their actual expenses may differ as widely as that. The object of the statute is to fix a certain allowance, out of which the officer may make a saving or not as he chooses, or is able. And while, in some cases, it may operate as a compensation, it is not so intended, and is not a fee, charge, or emolument of his office within the meaning of section 834. It is much like the arbitrary allowance for the attendance of witnesses and jurors, which may or may not be sufficient to pay their actual expenses, depending altogether upon the style in which they choose to live."

In *Steenon v. Wallace*, supra, l.c. 909, the court said:

"Generally, mileage is a travel allowance at a fixed rate per-mile, as applied to this case, mileage is a rate per-mile traveled, fixed and allowed by the Legislature to specified public officers for travel expenses in specified instances. Mileage may or may not equal or exceed actual expenses incurred, but without a statutory grant there is no mileage.* * *"

In *Caswell v. N. Y. Cent. R. R. Co.*, supra, l.c. 642, the court said:

"* * *Mileage is a well-established method, widely used in public and private business, of reimbursing an officer or employee for the expense necessarily sustained by him in traveling to perform his duties. It is merely a substitute for actual expenses, and, theoretically, covers only the cost of transportation of the individual officer or employee, and the rate is set upon that basis, unless otherwise indicated by circumstances.* * *"

August 28, 1945

In *Richardson v. State*, supra, the court said, l.c. 594;

"It must be conceded that the \$3 per day allowed the commissioner is the limit of his compensation for his day's work, in whatever way it may be performed in the discharge of his official duties. He cannot lawfully claim that the county is also bound to pay his board, or other personal expenses. And the "mileage" allowed him is intended to compensate him for expenses of his travel on official business. That is the legal meaning and import of the term. It is defined in the *Century Dictionary* as 'payment allowed to a public functionary for the expenses of travel in the discharge of his duties, according to the number of miles passed over.' The same definition substantially is found in *Bouvier's* and other law dictionaries. The commissioner is at liberty, under our statute, to adopt and pursue his own method and means of travel. He may, if he chooses, travel by railway when accessible, or by vehicle hired by him, or use his own conveyance. But, whatever the mode adopted, he must pay all the expenses incurred, and his only source of reimbursement is the amount of the mileage allowed him. * * *"

It is clear, from the cases cited that the theory of the Legislature in providing for a certain rate of reimbursements for each mile traveled by the coroner is that the mileage allowance be reimbursement for travel expenses. Since the coroner is entitled to no other compensation than that allowed by statute, it follows that the .08¢ per-mile provided by the statute is the only and the entire allowance for travel expenses of the coroner. *Smith v. Pettus Co.*, 136 S. W. (2d) 282, 345 Mo. 839; *Rinehart v. Howell Co.* 153 S. W. (2d) 381, 348 Mo. 421.

Sections 13252 and 13253 R. S. Mo. 1939, deal with the payment of costs of an inquest on a dead body by relatives or other persons where the person has died from a cause other than violence or casualty. These sections are, therefore, not pertinent to the question

Mr. G. Logan Marr

-7-

August 28, 1945

presented herein.

CONCLUSION

It is, therefore, the opinion of this department that the County Coroner is entitled to travel expenses only in the extent of the .08¢ per-mile allowed by Section 13424 of the Revised Statutes of Missouri, 1939.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SNC:mw

SHERIFFS: Fees allowed for summoning petit jury.

2 / Smith
September 25, 1945

10-3
FILED
57

Honorable G. Logan Marr
Prosecuting Attorney
Versailles, Missouri

Dear Sir:

Reference is made to your letter of September 17, 1945, requesting an official opinion of this office, and reading as follows:

"There has been some question raised about the charges made by the sheriff concerning the summoning of the petit jury of the circuit court for the September Term 1945. Apparently this is the first time the question has been raised within my experience.

"The circuit clerk issues a jury summons for the summoning of the petit jury. He informed me that no sheriff for at least fifteen years has made a return on the jury summons. The sheriff has put on his monthly bill to the county court a charge for summoning the jury for the term of court, and made a flat charge for the service. The charge has been around \$34.00 to \$36.00, for the service. No division of the fees and the mileage. The same has been paid from time to time without protest or question.

"The facts disclose that a separate jury summons has been mailed out for each regular juror and his alternate. Rarely has there been any service of jury summons by personal service. And now, the charge for jury service as a flat charge is made by the present sheriff in the sum of \$65.00.

September 25, 1945

"The County Court has balked on this bill, and turned same down, and tendered instead a warrant in the amount of \$36.00 for said service. This the sheriff refuses to accept. Now the question comes up, what would be a proper charge, for summoning a jury by mail?

"If the bill presented shows no actual mileage, but just a flat sum, the court has assumed that the service is still by mail, and no mileage, in summoning the members of the panel by personal service.

"Would there be a difference in service by mail and service by personal service for summoning a petit jury?"

In the determination of fees to which an officer may be entitled for the discharge of his official duties, one paramount principle must be borne in mind. It is stated thusly in *Nodaway County v. Kidder*, 129 S. W. (2d) 857, 1. c. 260:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. *State ex rel. Buder v. Hackmann*, 305 Mo. 342, 265 S. W. 552, 534; *State ex rel. Linn County v. Adams*, 172 Mo. 1, 7, 72 S. W. 655; *Williams v. Chariton County*, 85 Mo. 845."

Keeping this rule in mind, we have examined the statutes relating to the fees of sheriffs and find that the following provisions of Section 13411, R. S. Mo. 1939, are pertinent to the question you have propounded:

"Sec. 13411. Fees of sheriffs. - Fees of sheriffs shall be allowed for their services as follows:

"For summoning a standing jury.....\$8.40

* * * * *

September 25, 1945

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip \$0.10"

From the foregoing, we conclude that for such services in summoning a petit jury a sheriff is to be allowed fees of \$8.40 plus mileage at the rate of 10¢ per mile actually traveled. The mileage fee is, of course, subject to the proviso that such venire summons be served more than five miles from the place where the court is held, and is further subject to the proviso that such mileage shall not be charged for more than one venire summons served on the same trip.

As to the collateral question relating to the fees to be allowed when personal service is not made, but the venire summons is simply mailed, we believe the answer to be found in Section 709, R. S. Mo. 1939, which reads, in part, as follows:

" * * * And the clerk of the court for which the jury is drawn shall immediately thereafter issue a summons to the sheriff of the county, directing him to summon the persons thus drawn as petit jurors to appear on such day of the term of such court as shall be named in such summons by the clerk of said court to serve as petit jurors; and it shall be the duty of the sheriff to make service of such process at least ten days before the first day of the term of court for which such persons are drawn, which summons shall be served by reading the same to the person so summoned or by leaving a copy of the summons at his usual place of abode with some member of the family over fifteen years of age, except in such cases as may be hereafter provided."

September 25, 1945

From the plain wording of the above statute, it is apparent that, a mode of service of the venire summons having been prescribed, service in any other fashion would be a nullity so far as entitling the sheriff to his fees for such purported service. Such being the case, we conclude that service by the method prescribed in the above statute is the only method by which a sheriff may serve the venire summons and create any liability upon the county for allowance of his fees.

CONCLUSION

In the premises, we are of the opinion that for his services in summoning a petit jury, a sheriff is to be allowed the sum of \$8.40 plus 10¢ per mile for each mile actually traveled in serving the venire summons, provided that such summons be served more than five miles from the place where court is to be held, and further provided that such mileage shall not be charged for more than one venire summons served on the same trip.

We are further of the opinion that in the event service of the venire summons be had by mail, the sheriff is not entitled to any fees whatever.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

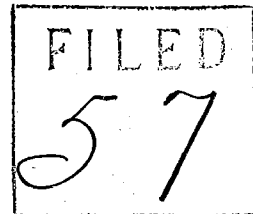
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

CONSTITUTION: (1) Construction of Art. V, Sec. 27, Constitution
PROBATE JUDGES: of 1945 with respect to incumbents in the office
of probate judge; (2) qualifications of persons
appointed as judge of probate to fill vacancies
occurring in current term.

October 24, 1945



11/16

Honorable Gordon J. Massey
Prosecuting Attorney
Ozark, Missouri

Dear Sir:

Reference is made to your letter dated April 27, 1945,
requesting an official opinion of this office, and reading as
follows:

"We have a probate judge who is now sick
and from present indications he will never
be able to take charge of and handle his
office. He has been out since December.

"Please advise me if he is unable to as-
sume the duties of his office if he will,
under the new constitution, be entitled
to receive one half of his salary until
his term expires.

"Also advise me whether or not the party
appointed to take his place and fill the
unexpired term must be a lawyer as pro-
vided in the new constitution."

With respect to the first question propounded in the
second paragraph of your letter of inquiry, we direct your at-
tention to Article V, Section 27, of the Constitution of 1945.
It reads as follows:

"Any judge of a court of record or magis-
trate who is unable to discharge the du-
ties of his office with efficiency by rea-
son of continued sickness or physical or

October 24, 1945

mental infirmity shall be retired from the office by order of a committee composed of three judges of the supreme court, one judge of each of the courts of appeals, and three circuit judges, elected by the judges of the respective courts, after notice and a fair hearing and on a finding of two-thirds of the committee that the disability is permanent. The judge so retired shall receive one-half his regular compensation until the end of his term of office. The supreme court shall prescribe rules of procedure under this section."

That the office of judge of probate is within the purview of this constitutional provision appears from Article V, Section 17, of the Constitution of 1945, which reads, in part, as follows:

"Probate courts shall be courts of record and uniform in their organization, jurisdiction and practice, * * *."

Although the Constitution of 1945 became effective on March 30, 1945, yet the effectiveness of its provisions in many instances has been suspended by the Schedule appended thereto. We particularly direct your attention to Section 3 of the Schedule so-appended to the Constitution of 1945, which reads as follows:

"The terms of all persons holding public office to which they have been elected or appointed at the time this Constitution shall take effect shall not be vacated or otherwise affected thereby."

The incumbent Probate Judge of Christian County has been elected under the provisions of Section 2438, R. S. Mo. 1939, which provides, in part, as follows:

"At the general election in the year 1878, and every four years thereafter, except as

October 24, 1945

hereinafter provided, a judge of probate shall be elected by the qualified voters in every county. Said judge shall be commissioned by the governor and shall take the oath prescribed by the Constitution for all officers and shall enter upon the discharge of his duties on the first day of January ensuing his election and continue in office for four years and until his successor shall be duly elected and qualified: * * *

Under this statute, the incumbent judge of probate was elected at the general election held in 1942, assuming office on the first day of January, 1943. Consequently, his term of office will not expire until the first day of January, 1947. He, therefore, was an officer such as is referred to in Section 3 of the Schedule of the Constitution of 1945, quoted supra. Such being the case, it becomes pertinent to determine whether or not the provisions of Article V, Section 27, of the Constitution of 1945, if made effective with respect to such incumbent, would have the effect of vacating or otherwise affecting his term of office. It is clearly apparent that to apply the retirement provisions of the Constitution of 1945 to incumbents would affect their term by reason of the vacation of a portion thereof, and would further affect their office by reason of depriving such incumbents of one-half the emoluments now thereto appertaining.

From the foregoing, we reach the conclusion that inasmuch as retirement of the incumbent judge of probate under the provisions of Article V, Section 27, of the Constitution of 1945 would have the effect of vacating the term and affecting the emoluments of the present incumbent, such constitutional provision is not effective with respect to judges of probate elected or appointed prior to the effective date of the Constitution of 1945.

With respect to the second question which you have propounded in the third paragraph of your letter of inquiry, we direct your attention to a portion of Article V, Section 25, of the Constitution of 1945, which reads, in part, as follows:

" * * * Judges of probate and magistrate courts shall be qualified voters of this state, and residents of the county. Pro-

October 24, 1945

bate judges shall be at least twenty five and magistrates at least twenty two years of age. Every judge and magistrate shall be licensed to practice law in this state, * * *."

The qualifications with respect to judges of probate at the time of the election of the incumbent are found in Section 1988, R. S. Mo. 1939, from which we quote:

" * * * Every judge of probate and of a county court shall have attained the age of twenty-four years, and shall have been a citizen of the United States five years, and shall have been a resident of the county in which he may be elected for one year next preceding his election; * * *."

Upon comparison of the qualifications as set out in the Constitution of 1945 with the qualifications embodied in the statute in effect at the time of the election of the incumbent, it immediately becomes apparent that an inconsistency exists between the two. In the premises, we deem the provisions of Section 2 of the Schedule appended to the Constitution of 1945 to be pertinent. We quote from said Section 2:

" * * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

This provision has the effect of keeping in force the statute under which the incumbent judge of probate was elected, and such qualifications would apply to any person appointed to succeed the present incumbent. Inasmuch as said statute does not require that the person so appointed be a licensed attorney in order to qualify, we conclude that such qualification will be unnecessary.

October 24, 1945

CONCLUSION

In the premises, we are of the opinion that the provisions of Article V, Section 27, of the Constitution of 1945, relating to the retirement of judges of courts of record and magistrates, and providing for compensation for such judges and magistrates so retired, are not applicable to the term of the present incumbent in the office of Probate Judge for Christian County, Missouri, for the reason that under the provisions of Section 3 of the Schedule appended to the Constitution of 1945, such constitutional provisions do not apply to the terms of such judges and magistrates as were elected or appointed prior to March 30, 1945, which was the effective date of the Constitution of 1945.

We are further of the opinion that in the event a vacancy occurs in the office of Probate Judge for Christian County, Missouri, the person appointed to fill such vacancy will not be required to be a licensed attorney.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

DENTISTRY:

Unlawful advertising.

February 6, 1945

716
FILED
58

Missouri Dental Board
Albany, Missouri

Attention: Hon. H. C. McCoy,
Secretary.

Gentlemen:

This will acknowledge your letter of January 2, 1945, directed to General McKittrick, and your letter of January 22, directed to the writer, in which you make correction of the Section of the Statutes referred to in the second paragraph of your letter. It is observed that you gave the Section of 1929, Revised Statutes, instead of the current Section covering the matter referred to in the Revised Statutes of 1939. With that correction, the number of Section 10071 will be substituted, by your permission, in the last line of the second paragraph of your letter of January 2, for the number of Section 13566.

Your letter then, of January 2, 1945, states:

"The Missouri Dental Board will appreciate your opinion as to whether or not the enclosed advertisement of the New York-Eastern Dental Laboratory violates Section 10088a of the Missouri Dental Law enacted in 1943.

"Also whether or not the advertisement of Dr. James B. Inscho violates Section 10071 of the Missouri Dental Law."

Your first request for the opinion of this department is, whether the advertisement of the New York-Eastern Laboratory, a copy of which you enclose with your letter, violates the terms of Section 10088a, Laws of 1943, page 971.

Missouri Dental Board
Attn: Hon H.C. McCoy.

-2-

February 6, 1945

That part of Section 10088a covering the matter in question is as follows:

"It shall be unlawful for any person or persons not duly registered and licensed to practice dentistry, or for any association, corporation, or other entity to solicit or advertise, directly or indirectly, by mail, card, newspaper, magazine, periodical, pamphlet, radio, sign, display, or in any other manner to the general public, to construct, supply, reproduce, or repair prosthetic dentures, bridges, plates, or other appliances to be used or worn as substitutes for natural teeth or for the regulation of natural teeth. * * *"

Further reading said Section, it is made a misdemeanor for "Any person, * * * association, * * * or other entity, * * *" to violate the terms of said Section hereinabove quoted. The offense created by Section 10088a is for

"* * * any association, corporation, or other entity to solicit or advertise, directly or indirectly, by mail, card, newspaper, magazine, periodical, pamphlet, radio, sign, display, or in any other manner to the general public, to construct, supply, reproduce, or repair prosthetic dentures, bridges, plates, or other appliances to be used or worn as substitutes for natural teeth or for the regulation of natural teeth. * * *"

The specific violation would be to "solicit or advertise" to perform those acts mentioned in the above quotation.

This advertisement exhibited with your letter gives the name of this Association or Company as the "New York-Eastern Dental Laboratory and Optical Co." It gives its location and street number, and has a drawing of a dental plate with the name of the company printed or stamped thereon. But nowhere does the advertisement state that the company "solicits" or "advertises" to the general public that it will construct, supply, reproduce, or repair prosthetic dentures, bridges, plates or other appliances to be used or worn as substitutes for natural teeth or for the regulation

February 6, 1945

of natural teeth. The mere existence and the address of this concern being stated in the advertisement is not of itself any positive advertisement that it will do or request that it may do anything prohibited by the Statutes. The advertisement, to violate the Statute named, would have to offer to do or make a request to do the kind of business which this Statute prohibits. It does not do this. The words "advertise" and "solicit" are of such frequent and ordinary use that it is easily understood that advertise means to announce publicly by notice of some kind, and that solicit means to request or ask for the right to perform some act. This advertisement we think, neither advertises nor solicits to do or that it desires to do the kind of dental work prohibited to be advertised or solicited by this Statute.

This is a penal Statute, and sets out that the violation of its terms shall constitute a misdemeanor. Section 10097, R.S. Mo. 1939, prescribes the punishment for the violation of the terms of Section 10088a at a fine of not more than \$200 or imprisonment in jail for not exceeding one year, or by both such fine and imprisonment. Our Courts uniformly hold that penal Statutes must be strictly construed in their enforcement.

An indictment or information must set out in particular the violation and the acts which constitute the commission of a crime in the language of the Statute creating the offense. The proof and evidence must show that the accused committed the offense as it is charged in the indictment or information. Nothing can be left to intentment or implication.

This rule is announced in 31 C.J., page 703, Section 257, as follows:

"An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. The general rule is that the charge must be so laid in the indictment or information as to bring the case precisely within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it. Either the letter

February 6, 1945

or the substance of the statute must be followed, and nothing is to be left to implication or intendment, or to conclusion. The want of direct averments of material facts cannot be supplied by argument or inference, nor by the conclusion 'contrary to the form of the statute.' * * *

The Supreme Court of Missouri in the case of State vs. Wade, 267 Mo. 249, had this principle of law before it and at page 256, said:

"* * * The organic law entitles every person charged with crime to be informed of the nature and cause of the accusation against him, and, in keeping with the spirit of this salutary and fundamental principle of justice, courts have evolved an inflexible rule that in criminal pleading nothing material can be left to intendment or implication. Where a crime is created by statute, the charge must be such as to specifically bring the accused within the material words thereof. * * *

Likewise, our Supreme Court in the case of State v. Rosenblatt, 185 Mo. 114, l.c. 121, on the same rule, said:

"The offense being a statutory crime, it was and is essential that the indictment should use the material words or their legal equivalents in charging the crime. * * *

59 C.J. has this to say on page 1113, Section 660, on the necessity of strictly construing penal Statutes, to-wit:

"Except in those jurisdictions where abrogated by statute, it is a fundamental rule in the construction of statutes that penal statutes must be construed strictly. * * *

On the same subject the Supreme Court of Missouri in the case of State vs. Bartley, 304 Mo. 58, l.c. 62, announced the same doctrine as follows:

Missouri Dental Board
Attn: Hon. H.C. McCoy

-5-

February 8, 1945

"* * *Criminal statutes are to be construed strictly; liberally in favor of the defendant and strictly against the State, both as to the charge and the proof. No one is to be made subject to such statutes by implication. * * *"

The burden and duty always rests upon the State to prove a criminal case as charged in the indictment or information. Our Supreme Court has held this in many cases. An apt example of the Court's holding on this point is in the case of State vs. Langley, 248 Mo. 545, l.c. 552, where the Court said:

"The burden is upon the State to establish every constituent element of the offense charged, and this burden remains with the State throughout the trial. (State v. Hardelein, 169 Mo. 579.) After a careful review of the authorities, we have come to the conclusion that in proving a charge under the statute in question, it was incumbent upon the State to show facts and circumstances which would tend to prove that the refusal or neglect with which defendant is charged was 'without lawful excuse. ' * * *"

Our Courts have uniformly held that the proof and evidence in a criminal case must follow the charge set up in the indictment or information. This principle is well stated by the Kansas City Court of Appeals in the case of State vs. Young et al., 163 Mo. App. Reports, 88, l.c. 98, where the Court said:

"* * * When the state charges a violation in a particular way, it must be bound by the position it takes and is not entitled to a verdict in its favor unless it makes proof of the particular charge which it has made. (cases cited). * * *"

The example of the advertisement accompanying your letter wherein it fails to affirmatively advertise or solicit for the doing of such dental practice as is prohibited by the Statute under the authorities and decisions above quoted,

Missouri Dental Board
Attn: Hon. H.C. McCoy

-6-

February 6, 1945

makes it appear reasonably certain that this advertisement does not constitute a violation of said Statute.

Your next question is, does the advertisement of Dr. James B. Incho violate Section 10071, R.S. Mo. 1939? This section is very lengthy and only that part of it will be quoted here which directly refers to the problem. The first paragraph of sub-section 3 of Section 10071 prohibits certain kinds of advertising by dentists.

The second paragraph of said sub-section 3 permits certain advertising, and is as follows:

"Any dentist licensed under this law may announce by way of professional card containing only the name, title, degree, office location, office hours, phone number, and residence address and phone number, if desired, and, if he limits his practice to a specialty, he may announce it, but such cards shall not be greater in size than three and one-half (3½) inches by two (2) inches, and such information may be inserted in public print when not more than one column in width and two inches in depth; * * *"

It will be noted that in the next to the last line of that part of said section just previously quoted, the advertisement to be inserted in the public print shall not be more than one column in width. As it is generally understood, one column, or a single newspaper column is two (2) inches in width. This advertisement of the person named, is four (4) inches in width, or what would properly be called a double column. We would not be aware of any method or manner to determine this matter except by the simple measurement of the advertisement. The section itself fixes the standard of width of such an advertisement permitted to be made by a dentist, at one column in width. This advertisement comprises two columns in width.

CONCLUSION.

It is, therefore, the opinion of this Department considering the terms of Section 10088a, Laws of Missouri,

Missouri Dental Board
Attn: Hon. H.C. McCoy

-7-

February 6, 1945

1943, page 971, and considering the facts disclosed by the advertisement itself, that the advertisement of the New York - Eastern Dental Laboratory and Optical Co. is not a violation of said Statute.

2) That under the facts disclosed by the measurement of the advertisement of Dr. James B. Insko which is demonstrated by measurement to be a two column advertisement instead of a one column advertisement, it is the opinion of this Department that said advertisement is in violation of that part of Section 10071, Chapter 64, R.S. Mo. 1939, hereinabove quoted.

Respectfully submitted,

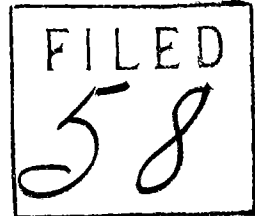
GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

GWC:lr

PARKS: City of second class may lease portion of public park for professional baseball games during limited periods.



October 24, 1945

10/26

Honorable W. W. McDonald
House of Representatives
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of October 20, 1945, in which you present the following question for our official opinion:

"May the City of Joplin, a city of the second class, purchase a park for general recreation and amusement for the public, and lease a portion of said park during certain seasons to professional baseball organizations, deriving revenue therefrom?"

The City of Joplin derives its general corporate powers from Section 6609, R. S. Mo. 1939, and among the powers granted we find the following:

"XXXVI. To acquire by condemnation, purchase, gift, lease or otherwise, property, real and personal, within such city and beyond the limits thereof for the use of the city * * * for the purpose of establishing and maintaining parks, * * * and for any other public use or purpose, and to manage and regulate the use thereof, and to sell, lease or otherwise dispose of the same.

"XXXVII. To acquire by condemnation, purchase, gift, lease or otherwise, property

October 24, 1945

real and personal within such city or beyond the limits thereof, and to establish, construct, maintain, add to, equip, improve, * * * places of recreation, * * *."

Cities of the second class are given further powers under article 3 of Chapter 133, R. S. Mo. 1939, to levy a tax not to exceed two mills on the one dollar valuation of all taxable property in the city, to establish a park fund, and if this is done, a park board of nine directors may be appointed, which board shall have exclusive control of the expenditure of the park fund, and shall supervise and improve all public parks.

Under Section 15337, R. S. Mo. 1939, the board also has power to acquire land for park purposes, this power being given in the following language:

" * * * Said board shall have power to purchase or otherwise secure grounds to be used for parks; * * * and shall in general carry out the spirit and intent of this article in establishing and maintaining public parks."

The word "park" is in such common usage as to require no definition, but it has been variously defined as (46 C. J., page 1373):

"A piece of ground adapted and set aside for purposes of ornament, exercise or amusement; a place to be kept open and ornamented for public uses, which may include anything conducing to the public pleasure, amusement, recreation, or health. * * * The term has been held to include a grove and a public golf course, * * *."

It is a well known fact that many cities in this state own and operate public golf courses, on which a fee is charged for playing, or public swimming pools, charging a fee for their use to defray current expenses of operation.

October 24, 1945

In *Aquamsi Land Co. v. City of Cape Girardeau*, 142 S.W. (2d) 332, an injunction suit was brought to prevent the city (third class) from expending the proceeds of a bond issue to construct a fair ground, community building, stadium, race track, grandstand, baseball and football fields, which would occupy approximately ninety per cent of the entire park site. It was contended that this construction would leave only ten per cent of available space for ornamentation and the unrestricted use of the public. We find the following in the opinion, l. c. 336:

"It was held in *Golf View Realty Co. v. City of Sioux City*, 222 Iowa 433, 269 N. W. 451, that the statutory power to acquire land for parks embraces the power to purchase it for a golf course. In that case the tract was already under lease to the city and in actual use as a municipal golf course. It is a matter of common knowledge that golf courses require a large area and are subjected to restrictive use. Also *City of Wichita v. Clapp*, 125 Kan. 100, 263 P. 12, 63 A.L.R. 478, ruled the devotion of a reasonable portion of a public park to an aviation field for recreation and other attendant purposes, came within the legitimate and proper use for which public parks are created. The reasoning of these cases, which makes the outdoor recreative nature of the proposed use the determinative factor, would apply to a track and facilities for horse racing. Hialeah Park, Tropical Park, Belmont Park, Arlington Park, Jefferson Park and Woodbine Park, for example, are famous race courses. We do not say or know that these are municipally owned, but merely point out that the word park has been thus widely associated with the sport of horse racing."

The opinion also refers to a case in which thirty acres of a forty-six acre public park were leased exclusively to a fair association for twenty-five years for racing purposes. This was a case arising in Nebraska, and the Supreme Court of that state held that a city cannot grant to any person or

October 24, 1945

association the use and control of a park so as to deprive the public of its enjoyment continuously, but it was conceded that a concession to hold races in the park for limited periods of time was proper.

The Missouri Supreme Court concludes, l. c. 335:

"There is no doubt in our minds about the fact that the contemplated athletic facilities come within proper park usage."

CONCLUSION

It is, therefore, our conclusion that a city of the second class may purchase a park for the use of the general public, and may rent or lease a portion of said park to professional baseball organizations which perform for the amusement of the public. Such lease, however, must not operate to deprive the public of the use and enjoyment of the park, or a major portion thereof, continuously.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

BOARD OF PHARMACY: May not make rules to prevent compounding and dispensing of drugs by a person issued a permit to conduct a drug store or pharmacy in village of less than five hundred inhabitants; but may refuse to grant permit, in its sound discretion.

March 9, 1945

FILED

59

3/17

Mr. W. C. McGreevy, Secretary
State Board of Pharmacy
220 East Walnut
Springfield, Missouri

Dear Mr. McGreevy:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"Under Section 10005, Chapter 60, R. S. Missouri 1939, provision is made for issuance, by the Board of Pharmacy, to any person who has had one year's experience under the supervision of a registered pharmacist, a permit to conduct a drug store or pharmacy in any village of less than five hundred inhabitants where there is no person licensed as a pharmacist within less than two miles of such village.

"May the holder of such permit compound and dispense a physician's prescription?

"Would the Board of Pharmacy be within its rights to rule on this matter?"

Our legislature has seen fit to provide a complete scheme for the regulation of druggists and pharmacists by Chapter 60, R. S. Mo. 1939, and has created a State Board of Pharmacy. The legislature has, by Section 10012, R. S. Mo. 1939, given the board power to make rules and regulations as may be necessary, not inconsistent with law. It reads, in part, as follows:

"The Board of Pharmacy shall have a common seal, and shall have power to adopt such rules and by-laws not inconsistent with law as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this chapter, * * * * *

In the case of State v. Smith, 49 S. W. (2d) 74, 1. c. 76, the court discussed the right of the legislature to enact a law, complete in itself, to authorize certain designated officials to make rules and regulations for the complete operation and enforcement of the law. The court said:

"The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose."

In the case of Sawyer v. United States, 10 Fed. (2d) 416, 1. c. 420, the United States Circuit Court of Appeals laid down a general proposition of law as follows:

"Authority to make rules and regulations necessary for carrying out the purpose of a legislative act can confer no authority to change the provisions of the act itself, and thereby deprive one of a right by the act."

The legislature having given to the Board of Pharmacy the right to make rules and regulations consistent with the law, and for the purpose of meeting the complexities which may arise under the law, we now turn in our consideration to Section 10005, R. S. Mo. 1939, making it unlawful to conduct a drug-store except as therein provided, which reads as follows:

"It shall be unlawful for any person not licensed as a pharmacist within the meaning of this chapter to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drugs, medicines, chemicals or poisons, or for the compounding of physicians' prescriptions, or to keep exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this chapter to compound, dispense or sell at retail any drug, chemical, poison or pharmaceutical preparation upon the prescription of a physician, or otherwise, or to compound physicians' prescriptions, except as an aid to or under the supervision of a person licensed as a pharmacist under this chapter. And it shall be unlawful for any owner or manager of a pharmacy or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist to compound, dispense or sell, at retail, any drug, medicine or poison, except as an aid to or under the supervision of a person licensed as a pharmacist: Provided, however, that nothing in this section shall be construed to interfere with any legally registered practitioner of medicine or dentistry in the compounding or dispensing of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the sale of poisonous substances which are sold exclusively for use in the arts, or for use as insecticides, when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes: Provided further, that in any village of not more than five hundred inhabitants, where there is no person licensed as a pharmacist within less than two miles of such village, the board of pharmacy may grant to any person who has had one year's experience under the supervision of a registered pharmacist a permit to conduct a drug

March 9, 1945

store or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than five hundred: * * * * *

(Italics ours.)

Statutes similar to Section 10005, supra, providing an exception permitting the operation of a drug store or pharmacy in small villages, and where there is no person licensed as a pharmacist within one or two miles of such village, have been held constitutional.

A Wisconsin statute prohibited the dispensing of drugs in any town having five hundred inhabitants or more, except under the charge of a registered pharmacist, while in towns of less than such population similar acts are prohibited except by a pharmacist or registered assistant pharmacist. It was held that this exception did not violate the Fourteenth Amendment to the Federal Constitution, guaranteeing equal protection of the laws. *State v. Evans*, 110 N. W. 241.

A similar statute was upheld in *State v. Donaldson*, 41 Minn. 74, and *People v. Roemer*, 153 N. Y. Supp. 323.

Section 13140, R. S. Mo. 1929, preceded Section 10005, R. S. Mo. 1939, supra, and was amended and reenacted in the Session Acts of 1939, page 368. Prior to its amendment the statute provided as an exception for villages of five hundred inhabitants or less, as follows:

"* * * Provided further, that in any village of not more than five hundred inhabitants, where there is no person licensed as a pharmacist within less than two miles of such village, the board of pharmacy may grant to any person who is licensed as assistant pharmacist a permit to conduct a drug store or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than five hundred: * * * * *

The amendment of 1939 deleted the words "or assistant pharmacist" which appeared after the word "pharmacist," and substituted the words "who has had one year's experience under the supervision of a registered pharmacist" for "who is licensed as assistant pharmacist."

The plan of the legislature in 1939 was to do away with the licensing of assistant pharmacists as a class in Missouri. There is nothing in the 1939 amendment that would indicate the legislature intended to withdraw the exception granted previously in allowing the conduct of a drug store or pharmacy in towns or villages of five hundred or less inhabitants, by other than a registered pharmacist, the experience required of a permittee being similar to the experience that was previously required in licensing an assistant pharmacist.

In discussing the distinction between a druggist and a pharmacist, the Kansas City Court of Appeals, in *State v. Chipp*, 97 S. W. 236, 121 Mo. App. 556, said:

"This statute was first enacted in 1881, prior to which, from time immemorial, there had been both druggists and pharmacists. It was enacted for the purpose of protecting the public against the danger attendant upon the compounding and dispensation of physicians' prescriptions, and the selling and dispensation of poisons by ignorant and inexperienced pharmacists. Its purpose was one of regulation merely. It left the druggist as it found him except in two respects only: First, as such druggist he was prohibited from compounding or dispensing the prescriptions of physicians; second, selling or dispensing poisons for medical use, unless he had in his employ such registered pharmacist or he was such himself. The statute does not even prohibit him from selling poison; it is only when it is sold for medical use that he commits a violation of law. He can sell patent medicines and every kind of drug that in its nature is free from poison. We confess our limited ability to enumerate the almost countless number of things that go to make a complete drug store: an experienced druggist alone might say how many there are. But common observation teaches that the duties of a pharmacist in most instances

March 9, 1945

pertains to a small part of the business carried on by a druggist. We find no difficulty in arriving at the conclusion that an individual may be a druggist or a dealer in drugs without being or having in his employ a pharmacist."

Section 10005, supra, in excepting small towns and villages of less than five hundred population allows the granting of a permit to conduct a drugstore or pharmacy. Therefore, the sphere that a permittee may operate in is very small indeed. First, there must be no person licensed as a pharmacist within less than two miles of the village. Second, the permittee cannot use the permit in any other village than the one for which it was granted. The exception in Section 10005, supra, further provides: "The board of pharmacy may grant to any person who has had one year's experience * * *." The word "may" is not mandatory and suggests that the Board of Pharmacy may exercise its experience and sound discretion in granting a permit to any person who has had one year's experience under the supervision of a registered pharmacist and should take into account the applicant's ability and the possible danger that might result in his compounding and dispensing a physician's prescription even though his acts are going to be restricted to a certain small village.

CONCLUSION

Therefore, it is the opinion of this department that the holder of a permit to conduct a drugstore or pharmacy in any village of less than 500 inhabitants where there is no person licensed as a pharmacist within less than two miles of such village may compound and dispense a physician's prescription.

That it is discretionary with the Board of Pharmacy whether or not they issue the permit, but after the Board of

Mr. W. C. McGreevy

(7)

March 9, 1945

Pharmacy has acted and issues a permit to conduct a drugstore or pharmacy in a village of less than five hundred inhabitants, there being no person licensed as a pharmacist within less than two miles of such village, the Board cannot, by rules, prevent the permit holder from compounding and dispensing a physician's prescription.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

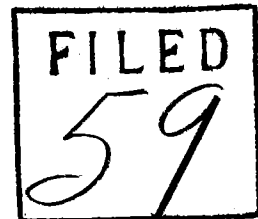
APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

MOTOR VEHICLE COMMISSIONER: Motor Vehicle Commissioner
cannot reopen, set aside or
SECRETARY OF STATE: change decision after driver's
license has been revoked or
suspended.

June 13, 1945



Honorable E. J. McKee
Motor Vehicle Commissioner
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of May 21, 1945, in which you request an opinion, as follows:

"It has been the custom of this department in the past to lift suspensions of driver's licenses upon the recommendation of the Justice of Peace or Judge who sentenced the individual where the suspension was for less than one year.

"It is the desire of this department to have your opinion on this procedure. Does or does not the Motor Vehicle Commissioner have such authority?"

The Statutes of Missouri pertaining to the revocation and suspension of operators', registered operators', or chauffeurs' licenses vest the authority to carry out these statutory provisions in an officer appointed by the Secretary of State, and designated as the Motor Vehicle Commissioner.

The Motor Vehicle Commissioner derives his authority to revoke or suspend operators', registered operators', or chauffeurs' licenses only after conviction in court and pursuant to the provisions of Sections 8457, 8458, 8459, 8460, and 8461, R. S. Mo. 1939. These sections provide as follows:

Sec. 8457.

"(a) The privilege of driving a motor vehicle on the highways of this State given to a nonresident hereunder shall be subject to suspension or revocation by the commissioner in like manner and for like cause as an operator's, registered operator's or chauffeur's license issued hereunder may be suspended or revoked.

"(b) The commissioner is further authorized, upon receiving a record of the conviction in this State of a nonresident driver of a motor vehicle of any offense under the motor vehicle laws of this State, to forward a certified copy of such record to the motor vehicle administrator in the State wherein the person so convicted is a resident."

Sec. 8458.

"The commissioner is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction of such person in another State of an offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator or chauffeur."

Sec. 8459.

"(a) Whenever any person is convicted of any offense for which this article makes mandatory the revocation of the operator's, registered operator's or chauffeur's license of such person by the commissioner, the Court in which such conviction is had shall require

the surrender to it of all operator's, registered operator's and chauffeur's State licenses, certificates or badges then held by the person so convicted and the court shall thereupon forward the same together with a record of such conviction to the commissioner.

"(b) Every court having jurisdiction over offenses committed under this article or under the provisions of any statute of this State regulating the operation of motor vehicles on highways, or any felony in the commission of which a motor vehicle is used, shall forward to the commissioner a record of the conviction of any person in said court for a violation of any of said laws, and every such court, except justice of the peace courts, and courts of criminal correction in the City of St. Louis shall have the power of suspending or revoking the license of any licensee under this article or the certificates of registered chauffeurs or registered operators under Sections 8372 and 8373, and amendments thereto, and shall certify to the commissioner a record of such suspension or revocation. Every justice of the peace and each judge of the courts of criminal correction of the City of St. Louis shall forward to the commissioner a record of the conviction of any person in his court for a violation of any of said laws for which he shall receive a fee of fifty cents to be taxed as costs in the case, and may recommend to the commissioner a suspension or revocation of said person's license or the certificate of such chauffeur or registered operator. The commissioner may suspend or revoke the license or certificates of any of the persons convicted as aforesaid."

Sec. 8460.

"The commissioner shall forthwith revoke the license of any operator, registered operator or chauffeur upon receiving a record of such operator's, registered operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

"1. Manslaughter (or negligent homicide) resulting from the operation of a motor vehicle;

"2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;

"3. Any felony in the commission of which a motor vehicle is used."

Sec. 8461.

"The commissioner shall not suspend a license for a period of more than one year and upon revoking a license shall not in any event grant application for a new license until the expiration of one year after such revocation."

These five sections are the only provisions of the driver's license law which prescribe the duties and powers of the Motor Vehicle Commissioner with reference to revoking or suspending licenses, except for Section 8463, R. S. Mo. 1939, which gives a person denied a license, or whose license has been cancelled, suspended, or revoked by the Commissioner, except where such cancellation or revocation is mandatory under the provisions of the driver's license law, the right to file a petition for hearing in the circuit court to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of the driver's license law. Section 8463 provides as follows:

"Any person denied a license or whose license has been canceled, suspended, or revoked by the commissioner except where such cancelation or revocation is mandatory under the provisions of this article shall have the right to file a petition within thirty (30) days thereafter for a hearing in the matter in the Circuit Court in the county wherein such person shall reside and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon reasonable notice, in writing, to the commissioner, and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or is subject to suspension, cancelation, or revocation of license under the provisions of this article. It shall be the duty of the prosecuting attorney of each county and of the City of St. Louis to represent the commissioner at such hearings."

It is from the above provisions that we must determine the correct answer to your question. The Motor Vehicle Commissioner holds an office created by statute, and the officer holding such office must find his authority to act in the statutes. It is apparent here that the statutes do not directly give the Motor Vehicle Commissioner the authority to lift suspensions of drivers' licenses previously suspended.

In 48 C. J., Sec. 237, page 1032, it is said:

"In addition to powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom. But no powers will be implied other than

those which are necessary for the effective exercise and discharge of the powers and duties expressly conferred and imposed, and where the mode of performance of ministerial duties is prescribed, no further power is implied."

Further, in Section 290, page 1033, it is said:

"Powers conferred upon a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity."

And, in Section 292, page 1033, it is said:

"In the absence of statutory authority, an officer in performing a statutory duty which does not involve the exercise of discretion is without the power of amendment; and when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall, although the statute conferring authority expressly makes his determination discretionary."

Applying these excerpts from Corpus Juris to the present question, we see that the Legislature has prescribed the mode in which a licensee is to be punished for violation of the law, that is, revocation or suspension of his license by the Motor Vehicle Commissioner. Thus, "no further power can be implied," but he must exercise this power "only in the manner * * * prescribed by law." When a person is convicted of any offense for which the driver's license law makes mandatory the revocation of the operator's, registered

operator's, or chauffeur's license by the Commissioner, the court requires the surrender to it of all operators', registered operators', and chauffeurs' State licenses, certificates or badges then held by the person so convicted, and thereupon forwards the same, together with a record of such conviction, to the Commissioner of Motor Vehicles. In these cases the Commissioner must forthwith revoke the license of the person convicted. In other cases, except for the offenses set out in Section 8460, supra, the court having jurisdiction of offenses committed under the driver's license law, or under the provisions of any statute of this State regulating the operation of motor vehicles on highways, forwards to the Commissioner a record of the conviction of any person in said court for violation of any of said laws, and every such court, except justice of the peace courts, and courts of criminal correction in the City of St. Louis, has the power of suspending or revoking the license of any licensee under the driver's license law, or the certificates of registered chauffeurs and registered operators under Sections 8372 and 8373, R. S. Mo. 1939, and amendments thereto. In the justice of the peace courts and courts of criminal correction of the City of St. Louis the court forwards to the Commissioner a record of the conviction of any person in his court for a violation of any of said laws, and recommends to the Commissioner a suspension or revocation of said person's license or the certificate of such chauffeur or registered operator. The Commissioner of Motor Vehicles then, in his discretion, may suspend or revoke the license or certificate of any of the persons convicted as aforesaid in the justice of the peace courts or courts of criminal correction of the City of St. Louis.

Only in the cases not made mandatory under Section 8460, supra, where the person is convicted in a justice of the peace court or court of criminal correction of the City of St. Louis, does the Commissioner ever have any power of discretion in the suspending or revoking of drivers' licenses, or registered operators' or chauffeurs' licenses. And, in these special cases where the Motor Vehicle Commissioner has completely exercised his judgment or discretion in the performance of his specific duty - that of revoking or suspending - "the act is beyond his review or recall." Further, in Section 8463, supra, the Legislature has specifically provided a method of petitioning the circuit court to examine the facts of the case, as to whether the Motor Vehicle Commissioner has abused his discretion, and to determine whether the petitioner is entitled to a license or

Hon. E. J. McKee

(8)

June 13, 1945

is subject to a suspension, cancellation or revocation of his license under the provisions of the driver's license law. This section provides the exclusive remedy to be followed after the Motor Vehicle Commissioner has acted.

CONCLUSION

Therefore, it is the opinion of this department that once the Motor Vehicle Commissioner has revoked or suspended a driver's, registered operator's, or chauffeur's license, he no longer has any power or authority to reopen, set aside, or change said order except in compliance with an order of the circuit court under Section 8463, R. S. Mo. 1939.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

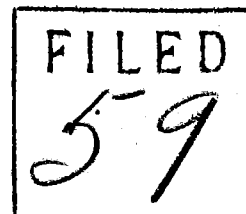
APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

MOTOR VEHICLES: Commissioner may refuse to license motor vehicles so constructed that they would cause excess and unnecessary noises when operated upon the highways of the state of Missouri.

September 12, 1945



Mr. E. J. McKee, Commissioner
Motor Vehicle Department
Office of Secretary of State
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of August 7, 1945, requesting an opinion from this department, which reads as follows:

"Enclosed please find three pictures of a motor vehicle propelled by airplane propeller which we have refused to license to operate on our State Highways because of danger, because of nuisance of noise, and because of unsafe braking capacity. This vehicle is capable of a speed of 75 to 80 miles per hour, making the noise of a P-38 Airplane. The propeller will pick up all dust, gravel and even good sized rocks in its wake and hurl in all directions. This vehicle has one set of hydraulic brakes, seal beam headlights, stop lights, and complies with law in some respects. Should the owner install four wheel brakes and a protection about the propeller, it still would make the roar of an airplane and throw the gravel and rocks.

"It is the desire of this office to have an official opinion from your Department on this matter of licensing these kinds of vehicles to operate on our highways."

Section 8369, R. S. Mo. 1939, subparagraph (a), provides as follows:

Sept. 12, 1945

"(a) Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration on a blank to be furnished by the commissioner for that purpose, containing: (1) a brief description of the motor vehicle to be registered, including the name of the manufacturer, the motor number and character, and amount of motive power, stated in figures of horsepower; (2) the name, residence and business address of the owner of such motor vehicle; (3) if said motor vehicle be a commercial vehicle the weight of the vehicle and its rated capacity of live load, in pounds or seating capacity; (4) if such motor vehicle be a specially constructed or reconstructed motor vehicle, the application shall so state and the owner shall furnish the commissioner such additional information as he shall require."

It becomes necessary, under the requirements of the above section, for a person seeking to register a vehicle as described in your letter, and the accompanying photographs, to furnish the Commissioner of Motor Vehicles such additional information as he requires.

Section 8403, R. S. Mo. 1939, provides as follows:

"On approval of application for license to operate motor vehicles and when the fee for same is paid to the commissioner of motor vehicles he shall forthwith forward or deliver to the owner through the mails or by his authorized agents the automobile department receipt, also two plates to be attached to the motor vehicle which when attached to the motor

vehicle specified in the application shall be prima facie evidence that the fees have been paid for such license and the commissioner of motor vehicles shall not issue any further receipt for the fee paid. The commissioner of motor vehicles shall transmit all fees received to the state treasurer by making out a triplicate receipt showing the date, the number issued to said applicant, the name of applicant, kind of car, the engine number, and the amount of fee paid. Said receipt shall contain the names of one hundred or less motor vehicle owners when such number have been received by the commissioner of motor vehicles. Upon the payment of the money specified in said receipt to the treasurer he shall sign the receipt in triplicate, returning the duplicate to the secretary of state, sending the triplicate to the state auditor and retaining in his office the original and no further receipt shall be issued by said treasurer to the individual owners of motor vehicles, the plates as specified above being the receipt of the owner of the motor vehicle for all fees paid."

Under Section 8403, supra, we see that it is the duty of the Commissioner of Motor Vehicles to approve applications for licenses to operate motor vehicles, indicating that the application must conform to certain requirements of the Commissioner before the application will be approved.

Section 8387, R. S. Mo. 1939, subparagraphs (b) and (c), provides as follows:

"(b) Muffler cutouts: Muffler cutouts shall not be used and no vehicle shall be driven in such manner or condition that excessive and unnecessary noises shall be made by its machinery, motor, signaling device, or other parts, or by

Sept. 12, 1945

any improperly loaded cargo. The motors of all motor vehicles shall be fitted with properly attached mufflers of such capacity or construction as to quiet the maximum possible exhaust noise as completely as is done in modern gas engine passenger motor vehicles. Any cutout or opening in the exhaust pipe between the motor and the muffler on any motor vehicle shall be completely closed and disconnected from its operating lever, and shall be so arranged that it cannot automatically open, or be opened or operated while such vehicle is in motion.

"(c) Brakes: All motor vehicles, except motorcycles, shall be provided at all times with two sets of adequate brakes, kept in good working order, and motorcycles shall be provided with one set of adequate brakes kept in good working order."

It is apparent that even though the vehicle, as described in your letter, might, by additional improvements, be made to comply with subparagraph (c) above, and that it could be provided with two sets of adequate brakes, yet the vehicle described in your letter does not comply with the requirements of subparagraph (b) of Section 8387, supra; and it is impossible for us to see how the vehicle could be used and driven in any manner without causing excessive and unnecessary noises by its machinery, motor or other parts. The fact being ascertained by the Commissioner, in the application for registration, that the vehicle in question could not be operated in a lawful manner upon the highways of the state of Missouri, he would be in the proper observance of his duties in not approving the application for a license to operate said vehicle.

CONCLUSION

Therefore, it is the opinion of this department that the Commissioner of Motor Vehicles may refuse to approve an application for license to operate a motor vehicle upon the highways

Mr. E. J. McKee

-5-

Sept. 12, 1945

of the state of Missouri, when such vehicle is so constructed that its use upon the highways of the state of Missouri would be impossible without causing excessive and unnecessary noises by its machinery, motor or other parts.

Respectfully submitted,

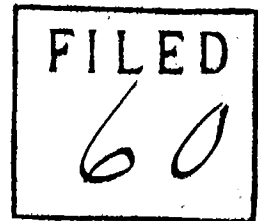
A. V. OWSLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

TAXATION OF MANUFACTURERS: Taxing of raw materials
and stocks on hand.



July 27, 1945

grr

Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

This department is in receipt of your letter under date of July 25, requesting an opinion on the following state of facts:

"The County Assessor has asked me a question and I am submitting it to you. In my county we have two places that manufacture garments. At Cassville, a shirt factory and at Monett a pants factory. He would like to know how to assess them and should he assess the stock that they have on hands. Also Armour & Company have a produce house in this county. They buy chickens, dress and pack them and then freeze them. A number of times store them in the ice plant. He would also like to know how to assess their stock and should the stock of these concerns be assessed."

Your attention is called to Section 11339, R. S. 1939, which states in part:

"All manufacturers in this state shall be licensed and taxed on all raw material and finished products, as well as all the tools, machinery and appliances used by them, in the same manner as is or may be provided

by law for the taxing and licensing of merchants; and no county, city, town, township, or municipal authority thereof, shall ever levy any greater amount of tax against a manufacturer than is levied against merchants for the same period. On the first Monday in June in each year it shall be the duty of each person, corporation or copartnership of persons, as provided by this article, to furnish to the assessor of the county in which such license may have been granted a statement of the greatest amount of raw material and finished products, as well as all the tools, machinery and appliances used by him or them, which he or they may have had on hand at any one time between the first Monday in March and the first Monday in June next preceding; said statement shall include raw material and finished products owned by such manufacturer, as well as all the tools, machinery and appliances used by him or them. It shall be the duty of the county assessor to enter such statements in a book to be prepared for that purpose at the expense of the county, suitably ruled, with columns for the name of the manufacturer, the amount of his or their statements as returned to the assessor, the valuation of such statements as equalized by the county board of equalization, and for state, county and school taxes, and such other columns as may be found useful or convenient in practice; such book shall be verified by an affidavit of the assessor, annexed thereto, in the following words, to wit:

' _____ being duly sworn, makes oath and says that he has made diligent efforts to secure sworn statements from all persons, corporations or firms, doing business as manufacturers in the county of which he is assessor; that so far as he has been able to secure such statements, they are correctly set forth in the foregoing book.' * * * * *

July 27, 1945

You will note the above section provides that taxing of manufacturers shall be in the same manner as is or may be provided by law for the taxing and licensing of merchants.

Section 11305, R. S. 1939, applies to the taxing of merchants, and provides:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in March and the first Monday in June in each year: * * * * *

The provisions of the two statutes cited above will be amended by the present Legislature to conform to the Constitution of 1945, and future assessments will necessarily have to comply with the laws enacted by this Legislature.

Conclusion.

It is the opinion of this department that, under the present statutes, the merchandise of the companies mentioned in your request for an opinion should be taxed in the amount and manner as provided in the statutes set out in this opinion.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

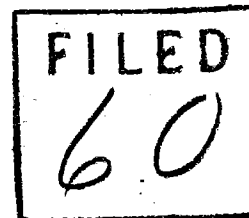
APPROVED:

Attorney General

WBD:ml

CONSTITUTIONAL: Whether the provision of Sec. 25, Art. V of the
LAW: Constitution of 1945 regarding retirement age of
judges applies to judges of the Probate Courts.

September 26, 1945



Mr. Emory Medlin
Prosecuting Attorney
Cassville, Missouri

In your letter of September 13, 1945, you requested an opinion of this department as follows:

"On page 9 of the New Constitution under Judicial Department, and on page 10, at the close it says "No appellate judge may continue in office after he has become seventy-five years of age". Now, what I would like to know is, does that apply to probate judges? I would appreciate your opinion.

"I also want to call your attention to the case of State vs. Coffman, in 188th S. W. 2d., on page 860 which I think will be of some benefit to the prosecuting attorneys over the state."

The section to which you refer in your letter is Section 25, of Article V, of the Constitution of 1945 which section reads as follows:

"Judges of the supreme court and courts of appeals shall have been citizens of the United States for at least fifteen years, and qualified voters of this state for nine years next preceding their selection. Such judges shall be at least thirty years of age but shall not continue to hold office after attaining seventy five years of age. Judges of the courts of appeals shall be residents of the district of their court. Circuit judges shall have been citizens of the United States for at least ten years, and qualified voters of this state three years next preceding their selection, and be not less than thirty years of age and residents of the circuit. Judges of probate and magistrate courts shall be qualified voters of this

state, and residents of the county. Probate judges shall be at least twenty five and magistrates at least twenty two years of age. Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, and except that persons who are now justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed.

Section 1 of Article V of the Constitution of 1945 reads as follows:

"The judicial power of the state shall be vested in a supreme court, courts of appeals, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrates courts, and municipal corporation courts."

Section 4 of Article V of the Constitution of 1945 reads as follows:

"The supreme court, courts of appeals, and circuit courts shall have a general superintending control over all inferior courts and tribunals in their jurisdictions, and may issue and determine original remedial writs."

Section 10 of Article V of the Constitution of 1945 reads as follows:

"Cases pending in any court of appeals shall be transferred to the supreme court when any member of the court of appeals or any division thereof dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of any of the courts of appeals, and may, after opinion, be transferred to the supreme court by order of either the court of appeals or the supreme court because of the

general interest or importance of a question involved in the case, or for the purpose of re-examining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from any court of appeals, whether by certification, transfer or certiorari, the same as on original appeal."

Section 13, of Article V of the Constitution of 1945, reads as follows:

"The courts of appeals shall be composed of three judges each, and shall continue as now established, with appellate jurisdiction coextensive with their district, the boundaries of which may be changed by law as public convenience may require. They shall have jurisdiction of appeals as provided by law from all inferior courts in their districts except appeals within the exclusive jurisdiction of the supreme court. They shall hold sessions at places provided by law and at times provided by their rules."

Section 23, of Article V of the Constitution of 1945, reads as follows:

"Judges of the supreme court and courts of appeals shall be selected for terms of twelve years, judges of the circuit courts for terms of six years, judges of the probate and magistrate courts and of the St. Louis courts of criminal correction for terms of four years, and all other judges for terms provided by law."

Section 26 of Article V of the Constitution of 1945, reads as follows:

"Appellate and probate courts shall appoint their own clerks."

The determination of the question raised by your letter turns, we think, on the question of whether or not a probate court is a court of appeals, for the reason that the second sentence of Section 25 of Article V of the new Constitution, which is the provision placing a limitation on holding office after seventy five years of age, refers back to the first sentence of that section and this first sentence deals only with judges of the Supreme Court and courts of appeals. Thus the age limit provision of the second sentence applies only to judges of the Supreme Court and courts of appeals.

The question of whether the probate courts fall within the term "courts of appeals" must be determined by the following rules of construction. The primary rule of construction is to ascertain the law-makers intent from the words used. (*Artophone Corporation v. Coale*, 133 S. W.(2d) 343, 345 Mo. 344; *City of St. Louis v. Pope*, 126 S. W.(2d) 1201, 344 Mo. 479; *American Bridge Co. v. Smith*, 179 S. W.(2d) 12; *Metropolitan Life Insurance Co. v. Schufler*, 180 S. W.(2d) 472.) The meaning of a word in a statute must be determined by the character of its use. (*State ex rel. Case v. Seahorn*, 223 S. W. 664, 283 Mo. 508.) In determining the meaning of any particular portion of a statute the whole statute must be considered. (*DeJarnett v. Tickameyer*, 40 S. W.(2d) 686, 328 Mo. 153; *Bowers v. Kansas City Public Service Co.*, 41 S. W. (2d) 810, 328 Mo. 770; *Coble v. The Scullin Steel Co.* (1932 Mo.App.) 54 S. W. (2d) 777; *Whitehead v. Farmers Fire Insurance Co.*, 60 S. W.(2d) 65, 227 Mo. App. 891.) The meaning to be given to statutory terms will be determined from the context of the statute. (*Mudelman v. Thimbles Inc.*, 40 S. W.(2d) 475, 225 Mo. App. 553.) In determining the true meaning of any provision of a statute, resort will be had to all parts thereof. (*Morgan v. Jewell Construction Co.* 91 S. W. (2d) 638, 230 Mo. App. 25.)

Since the established rules of construction applicable to statutes apply to the construction of constitutional provisions, the question before us must be determined by the above cannons of construction. (*State ex rel. Buchanan County v. Imel*, 242 Mo. 293, 146 S. W. 783; *C.J.S. Vol. 16, Sec. 15, page 51.*

Throughout the article on judicial departments in the Constitution of 1945, we find a clear indication that the term "courts of appeals" denotes an entirely different court than the probate court. Section 1 of Article V of the Constitution of 1945 sets out the judicial powers of the state, and in enumerating the courts wherein this power lies, it lists courts of appeals and probate courts separately. In Section 4, supra, the Constitution groups courts of appeals with the Supreme Court and the Circuit Courts and grants them superintending powers over inferior courts. This superintending function of the courts is one which is peculiar to the

September 26, 1945

superior courts and the probate court has never had, nor does the constitution now give it, general superintending power over any other court. In Section 10 of Article V of the Constitution of 1945, there is a provision for an appeal or for transfer to the Supreme Court of the state on certiorari from the court of appeals. In using the term "courts of appeals" here, the convention obviously was referring to the intermediate appellate courts only. In Section 13, supra, the Constitution provides that the courts of appeals shall be composed of three judges each. This again indicates that the intermediate courts were meant by the term "courts of appeals" and that the probate courts could not be considered within the meaning of that term, since the probate court consists of but one judge. In Section 23, supra, the Constitution provides for the terms of all judges of the state, and here again the judges of the courts of appeals and the judges of the probate and magistrate courts are listed separately and different terms are provided for each. In Section 26, supra, the Constitution provides that appellate and probate courts shall appoint their own clerks. Again, this listing of the two types of courts separately, we think, indicates that the appellate courts and probate courts are two entirely different courts within the meaning of the Constitution and that the probate court cannot be considered an appellate court within the meaning of the term "courts of appeals."

CONCLUSION

It is, therefore, the opinion of this department that the provision of Section 25 of Article V of the Constitution of 1945 providing that judges of the Supreme Court and courts of appeals shall not continue to hold office after attaining seventy five years of age does not apply to probate judges of the state.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:

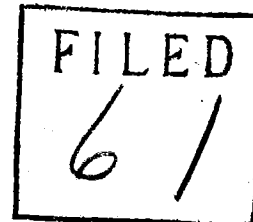
J. E. TAYLOR
Attorney General

SNC:mw

MOTOR FUEL TAX: Power to waive penalties and interest.

March 28, 1945

Mr. George Metzger
State Inspector of Oils
Jefferson City, Missouri



Dear Mr. Metzger:

Your letter of March 27, 1945 requesting an opinion from this department as to the extent of your authority to waive accrued interest and penalties on delinquent motor vehicle fuel taxes due the State of Missouri from distributors, has been received.

Your letter states:

"Regarding our conversation referring to delinquent tax account of Carter & Lawson Oil Company of Lebanon, Missouri:"

"The records of this department show the following amounts due:"

| | <u>Tax</u> | <u>Penalties</u> | <u>Interest</u> |
|----------------|---------------|------------------|-----------------|
| "October, 1942 | \$358.32 | \$161.40 | \$52.28 |
| November, 1942 | 881.88 | 220.45 | |
| December, 1942 | <u>257.16</u> | <u>64.30</u> | |
| Totals | \$1,497.36 | \$446.15 | \$52.28." |

"There is a total of \$1,995.79, in taxes, penalties and interest, due the State, plus interest accumulative at the rate of 1 per cent per month."

"The last payment of \$50.00 to apply on this account was made March 21, 1945."

"The writer has been in contact with the above company, regarding liquidation of this account, and is of the opinion that he can effect a settlement by

securing payment of the amount of taxes due the State, amounting to \$1,497.36, on or before June 1, 1945, if the penalty and interest charges assessed against this account can be waived."

"Is it your opinion that Section 10 of our present Motor Fuel Tax Law gives the administrator authority to waive said penalties and interest charges in this particular case?"

Section 10 of the Laws of 1943, page 683 in the act popularly known as the Motor Vehicle Fuel Tax Law, is as follows:

"SECTION 10. Administrator may waive penalties and interest, when.---
When any distributor shall fail to pay to the administrator the amount of taxes due under this act when the same shall be payable, and by reason thereof, penalties and interest accrue as provided in Section 9(b), if it appears to said administrator that the delay in payment was due to conditions beyond the control of the distributor and the same is paid within ten (10) days after the last date the tax should have been paid, he may, in his discretion, waive said penalties and interest."

Subsection (c) of Section 7, page 680, Laws of Missouri 1943 fixes the time when each distributor, under the act, shall pay the tax due from him. Part of said Subsection (c) must be read with said Section 10 in order to arrive at the proper understanding of the extent of your authority in the matter submitted. That part of said Subsection (c) so applying to the terms of said section 10 is as follows:

"(c) At the time of filing each monthly report with the administrator, each

distributor shall enclose with such report to the administrator a bank draft, certified check, or postal, express or telegraph money order, payable to the administrator in the full amount of the motor fuel tax due from such distributor for the next preceding calendar month which shall be computed as follows:" * * *."

From the statement of facts given in your letter, the last dates on which the several items of tax due from the Carter & Lawson Oil Company, of Lebanon, Missouri should have been paid were the last day of October, 1942, the last day of November, 1942 and the last day of December, 1942. Subsection (c) of said Section 7, provides that a bank draft, certified check, or postal, express or telegraph money order in payment of the tax due for the last preceding calendar month shall accompany the monthly report due from each distributor to the office of the inspector.

Section 10, of said act, as it will be observed, provides that upon the failure of any distributor to pay the amount of tax due when the same shall be payable, and if, by reason thereof, penalties and interest accrue as provided in Section 9 (b), page 682, Laws of Missouri, 1943, and with other conditions being satisfactory to the inspector and the tax is paid within ten (10) days after the last date the tax should have been paid, the inspector may, in his discretion, waive said penalties and interest.

While said Section 10 does give the administrator of the act (The Inspector of Oils) discretion as to his judgment of conditions causing the tax to become delinquent, it denies him altogether the power and authority to waive such penalties and interest unless the delinquent tax be paid within ten (10) days after the last date the tax should have been paid.

March 28, 1945

The fact that the Carter & Lawson Oil Company paid, as it is said, on March 21, 1945, the sum of \$50.00 on this account does not alter the case. That payment cannot relieve said company of its delinquency in the payment of said tax. Such payment could not substitute March 21, 1945 for any of the days of any of said three months in 1942 when the tax should have been paid so as to be claimed by the said company as a basis for waiving the penalties and interest on such taxes.

CONCLUSION

It is, therefore, the opinion of this department that when taxes on motor fuels have become delinquent the administrator may only waive said penalties and interest if and when said taxes are paid within ten (10) days after the last date the tax should have been paid, and that Section 10 of the present Motor Vehicle Fuel Tax Law does not give the administrator authority now to waive said penalties and interest charges in the case of the Carter & Lawson Oil Company of Lebanon, Missouri.

Respectfully submitted

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED

J. E. TAYLOR
Attorney General

GWC/mw

OILS AND MOTOR FUEL:

Duty of whom to provide inspection
and pay inspection fees.

April 4, 1945

4-7
FILED
61

Honorable George Metzger
State Inspector of Oils
Department of Oil Inspection
Jefferson City, Missouri

Dear Mr. Metzger:

Your letter of March 8, requesting an opinion from this Department, has been received, and the writer has been directed to prepare the opinion. Your letter states:

"In accordance with our phone conversation recently, I would be pleased to have you give an opinion as to who is the party responsible for sending samples of petroleum products to this office for inspection, under Section 14688, R.S., Mo. 1939, amended August 2, 1943, covering Inspection of Oils."

Section 14688, Laws of Missouri, 1943, page 592, is the Section re-enacted by the Legislature upon the repeal of Section 14688, R.S. Mo. 1939.

Article 2, Chapter 109, R.S. Mo. 1939, containing Sections 14686 to 14712, inclusive, constituted the statutes of this State, prior to the Act of 1943, concerning the inspection of oils. The Legislature of Missouri, Laws of 1943, page 591, repealed Sections 14688, 14689, 14690, 14695 and 14703 of Article 2, Chapter 109, R.S. Mo. 1939, and re-enacted in lieu thereof, four new Sections to be known as Sections 14688 (the section to which you refer in your letter, and upon which you request this opinion), 14689, 14690 and 14695, relating to the same subject. It must be observed that these new Sections are amendments of said Article 2, Chapter 109, R.S. Mo. 1939. There is no new Article or Chapter created, but Article 2, Chapter 109, R.S. Mo. 1939 remains the same, and is referred to as such.

April 4, 1945

in the amendment repealing the old sections numbered, and re-enacted in the Laws of 1943. It will be observed especially that only five sections of Article 2, Chapter 109, as they existed in the Revised Statutes of 1939, were repealed by the Act of 1943. Particular attention is called to the fact that Section 14697, R.S. Mo. 1939, was not repealed, but remains undisturbed as a part of said Article 2, Chapter 109. That Section is as follows:

"Whenever any person, partnership or corporation shall receive from any other state any of the oils, gasoline or fluids mentioned in this article that has not been inspected under the laws of this state, and inspection fees thereon paid, it shall be his or its duty to cause to be inspected the said oils or gasoline, as provided in this article, before the same is offered for sale; and shall pay the same inspection fees as is provided in this article."

In determining the question you submit as to who is the party responsible for sending samples of petroleum products to your office for inspection under said Section 14688, as amended in 1943, said Section as so amended, must be read with said Section 14697. That part of Section 14688, Laws of Missouri, 1943, page 592, to be read and applied in connection with said Section 14697, is as follows:

"All kerosene, and all gasoline or any other motor fuel, whether manufactured in this state or not, shall be inspected as provided in this article before being offered for sale or used in this state. It is hereby made the duty of every dealer, distributor, producer, or compounder of such oil or fuel, immediately upon receipt of a consignment of the same, at his own expense, to express to the State Inspector of Oils, at his principal office, a properly identified sample of not less than eight (8) ounces of such oil or fuel so received, and said inspector shall test and inspect the same: * * * "

Section 14697, R.S. Mo. 1939, supra, provides that when any person, partnership or corporation receives oil or other fuel fluids mentioned, from another State, that has not been inspected and the inspection fees paid thereon, he or it

April 4, 1945

shall cause the same to be inspected and pay the same inspection fees thereon as are provided in Article 2 before offering it for sale. Section 14695, Laws of 1943, provides the schedule of fees for the inspection of motor fuels "under this article" etc.

Section 14688, Laws of 1943, provides that all motor fuel, whether manufactured in this State or not, shall be inspected as provided by this Article, meaning Article 2, Chapter 109, R.S. Mo. 1939. This language in said Section being read with Section 14697, makes the sending of samples for inspection of all oils and motor fuels, wherever manufactured, the duty of every dealer, distributor, producer and compounder, instead of restricting their said duties to oils and fuels manufactured out of the State, as provided in Section 14697, and by providing that all oils and motor fuels shall be so inspected as is provided in this Article, Section 14688, Laws of 1943, harmonizes with the terms of Section 14697 which require all persons receiving oils, gasoline and fluids mentioned in said Article 2, to pay the inspection fee as provided in said Article before offering the same for sale. These sections read together thus show that the Legislature intended thereby to make it the duty of every dealer, or distributor, to see that the inspection of such products is made and the fees have been paid on oils received by him, and if they have not been so inspected and such fees paid, it becomes his duty to have such fuels inspected and to pay the inspection fees thereon before offering the same for sale.

CONCLUSION.

It is, therefore, the opinion of this Department that it is the duty of every dealer, distributor, producer or compounder of such oil or fuel, whether manufactured in this State or not, that has not been inspected and the fees paid thereon when he or it receives them, to cause the said oil and motor fuel to be inspected, and pay the inspection fees thereon as provided in Article 2, Chapter 109, R.S. Mo. 1939, and in the amendment thereof by the Act of 1943.

Respectfully submitted,

GEORGE W. CROWLEY,
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

GWC:ir

FEDERALLY POSSESSED PROPERTIES:

Immunity of governmental agencies and instrumentalities from paying motor fuel tax.

May 2, 1945

5/3
FILED
61

Honorable George Metzger
Inspector of Oil Inspection
Jefferson City, Missouri

Dear Mr. Metzger:

Your letter of April 25, to General Taylor, requesting an opinion on the matter of the United States Government and its agencies and instrumentalities being liable for motor fuel tax, and in which letter you quote a letter to you dated March 12, 1945, from Mr. Ellis T. Longenecker, has been received.

Your letter states:

"I am in receipt of letter dated March 12, 1945, as set out below, from Ellis T. Longenecker, Federal Manager of Motor Carrier Transportation Systems and Properties, 324 Hodgson Building, Minneapolis, Minnesota.

"Mr. George Metzger, State Inspector of Oils
Jefferson City, Missouri

"Following is a list of Federally possessed properties in the operation of which United States Government Tax Exemption Certificates on Treasury Department Form No. 1094 will be executed, together with the name of the Federal Operating Manager who is authorized to execute such certificates:

"Federally Possessed Properties

Century Motor Freight
Healzer Cartage Company
Janke Transfer Company
Matthews Freight Service, Inc.
Midnite Express, Inc.
R-B Freight Lines, Inc.
Toedebusch Transfer, Inc.
Wilson Storage and Transfer Co.

Federal Operating Manager

Lloyd P. Davis
Nels Goeson
Harry C. Thornton
Lloyd P. Davis
James F. Ahearn
Harold L. Jones
Jack Otterson
Norman Nold

May 2, 1945

"Tax Exemption Certificates pertaining to Missouri taxes will be filed principally by the Federal Operating Managers of the Properties of Healzer Cartage Company and Toedebusch Transfer, Inc. Photostatic copies of the authority of each of these Federal Operating Managers to execute Tax Exemption Certificates are enclosed herewith. The signature of the authorized person appears on each such photostatic copy.

(Signed) Ellis T. Longenecker,
Federal Manager."

"In line with our telephone conversation today, pertaining to this subject, I respectfully request your written opinion regarding the question of exemption of the Missouri Motor Fuel Tax, in connection with the operation of Federally possessed properties, as named in Mr. Longenecker's letter."

The matter out of which your request for this opinion grew is Presidential Executive Order #9462, issued by the President of the United States on August 11, 1944, whereby the Director of the Office of Defense Transportation through or with the aid of public officers, Federal Agencies or other governmental instrumentalities, that he may designate, to take possession, assume control of, and operate or arrange for the operation of the Motor Carrier Transportation Systems named in a list thereto attached, the names of individual units of such Motor Carrier Transportation Systems which are contained in Mr. Longenecker's letter to you, and as copied on page 1 of your letter to this Department, being included in the list of Motor Carrier Transportation Systems attached to said Presidential Executive Order #9462.

Said Presidential Executive Order #9462 is as follows:

"No. 9462

"9 F.R. 10071

"POSSESSION AND OPERATION OF CERTAIN MOTOR CARRIER
TRANSPORTATION SYSTEMS.

May 2, 1945

"WHEREAS after investigation I find and proclaim that the motor carrier transportation systems of the motor carriers named in the list attached hereto and made a part hereof are equipped for the transportation of materials of war and supplies that are required for the war effort, or useful in connection therewith, and are now engaged in such transportation; that there are threatened interruptions of the operation of the said transportation systems as a result of a labor disturbance; that the war effort will be unduly impeded or delayed by such interruptions; that it has become necessary in the national defense to take possession and assume control of the said transportation systems for needful and desirable purposes connected with the prosecution of the war and that they be operated by or for the United States; and that the exercise, as hereinafter specified, of the powers vested in me is necessary to insure, in the interest of the war effort, the operation of the said systems:

"NOW, THEREFORE, by virtue of the power and authority vested in me by the Constitution and laws of the United States, including the act of August 29, 1916, 39 Stat. 645, (17) the First War Powers Act, 1941, (18) and section 9 of the Selective Training and Service Act of 1940 as amended by the War Labor Disputes Act, (19) as President of the United States and Commander in Chief of the Army and Navy, it is hereby ordered as follows:

1. The Director of the Office of Defense Transportation is authorized and directed, through or with the aid of any public officers, Federal agencies, or other Government instrumentalities, that he may designate, to take possession and assume control of, and to operate, or arrange for the operation of, the motor carrier transportation systems of the motor carriers named in the list attached hereto and made a part hereof, including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such systems, in such manner as he may deem necessary for the successful prosecution of the war; and to do anything that he may deem necessary to carry out the provisions and purposes of this order.

2. Subject to applicable provisions of existing law, including the orders of the Office of Defense Transportation issued pursuant to Executive Orders 8989, as amended, (20) 9156, (21) and 9294, (22) the said transportation systems shall be managed and operated under the terms and conditions of employment in effect between the carriers and the collective bargaining agents at the time possession is taken under this order. During his operation of said transportation systems the Director shall observe the terms and conditions of the directive order of the National War Labor Board, dated February 7, 1944; provided, however, that in the case of each said transportation system the Director is authorized to pay the wage increases provided for by the said directive order of the National War Labor Board, which accrued

May 2, 1945

prior to the taking of possession of the said system under this order, only out of the net operating revenue of the said system.

3. Except with the prior written consent of the Director, no attachment by means process, garnishment, execution, or otherwise shall be levied on or against any of the real or personal property or other assets, tangible or intangible, in the possession of the Director hereunder.

4. Possession, control, and operation of any transportation system, or any part thereof, or any real or personal property, taken under this order shall be terminated by the Director when he determines that such possession, control, and operation are no longer necessary for the successful prosecution of the war.

5. For the purposes of paragraphs 1 to 4, inclusive, of this order, there are hereby transferred to the Director the functions, powers, and duties vested in the Secretary of War by that part of section 1 of the said act of August 26, 1916, (23) reading as follows:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes in connection with the emergency as may be needed or desirable.

6. Upon the request of the Director of the Office of Defense Transportation the Secretary of War is authorized to take any action that may be necessary to enable the Director to carry out the provisions and purposes of this order.

FRANKLIN D. ROOSEVELT.

The White House
August 11, 1944."

It will be observed that said Presidential Executive Order #9462, recites that it is made pursuant to the prosecution of the war effort, and that such Order is based upon the authority given the President of the United States to exercise such powers as are in said Order set forth in Section 1361, Title 10, U.S.C.A., passed August 29, 1916, and the amendment thereof by the Act of February 28, 1920.

Section 1361, supra, appears at page 233 of said Volume or Title 10, and is as follows:

May 2, 1945

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Section 1361 was amended by the Act of February 28, 1920, with the further additional proviso found in the Pocket Part at page 151 in Volume or Title 10, and is as follows:

"* * * 'nothing in this act shall be construed as affecting or limiting the power of the President in time of war * * * to take possession and assume control of any system of transportation and utilize the same' under section 1 of Act Aug. 29, 1916, cited to text."

The above quoted amendment of February 28, 1920, is contained in U. S. Statutes at Large, Volume 41, Part 1, Public Laws, page 456, Chapter 91.

That the President in the exercise of his constitutional war powers has the power of requisitioning private property in the interest of the war effort, is well stated in 67 C.J. 373, in Sections 62 and 63. That text states the rule as follows:

"The power to requisition private property for war purposes is an essential attribute of sovereignty; * * *"

* * * * *

"In time of war, by virtue of the constitution, and usually by statutory enactments of congress, comprehensive powers reside in the president, as commander in chief of the army and navy, to requisition and appropriate property needed for the prosecution of the war or the maintenance or transportation of troops and munitions of war, and every presumption is in favor of the legality of his acts, or the acts of those exercising his authority. * * *"

May 2, 1945

"Under Statutes. In time of war statutes have usually been enacted which provide for the requisition of private property for war purposes, the authority of the congress to enact such statutes not being confined to property directly needed in war, but extending to other property needed or useful in connection with war activities. * * * "

Executive Order #9462 is identical in purpose and authority and identical in the right so to do, with the Order of the President of the United States in taking over the railroads of the country in 1917, under the Act of August 29, 1916.

Both text authorities and court decisions hold that in so taking over the railroad systems, as stated, the United States acted in its sovereign capacity, and that during its tenure of control its property rights in the instrumentality and agency of the systems was equivalent to ownership. The same rule is applicable to Executive Order #9462.

51 C.J. 448 and 449 in Sections 76, 77 and 78, states the rule as follows:

"Basis of Control. By the act of congress approved August 29, 1916, the president was given power 'in time of war' to take possession and assume control of systems of transportation within the boundaries of the continental United States, and in pursuance thereof issued his proclamation declaring that he took possession and assumed control of each and every system of transportation within such boundaries, consisting of railroads engaged in general transportation, including terminals and all other equipment and appurtenances commonly used upon or operated as a part of such rail systems of transportation. By a subsequent statute rights and liabilities under the federal control were defined and the manner of such control prescribed. In taking over the control and operation of such railroads the United

May 2, 1945

States acted in its sovereign capacity, under a right in the nature of eminent domain, and the statute providing therefor was not unconstitutional.

"Scope and Extent. During the period of federal control of railroads complete possession by the United States replaced the ordinary incidents of private ownership, and its control extended not merely to the physical property but to the entire organization, including officers, directors, and employees, who thereupon became agents and employees of the government rather than of the respective railroad companies. So the railroads became mere agencies or instrumentalities of the government, and it was a bailee of property being transported thereby, * * * "The relations between the companies and the United States being analogous to those of lessor and lessee. * * * "

"In Whom Vested. By the president's proclamation assuming possession and control of the railroads a director general of railroads was appointed and authorized to take possession and control of the systems of transportation embraced by the proclamation and to operate and administer them. Such appointment and delegation of authority were within the power conferred upon the president, and by virtue of it the possession, control, and management of such railroads became completely and exclusively vested in the director general, who was not a carrier, but rather an operator of carriers, * * * "

The creation of properties such as the Transportation Systems here as governmental agencies and instrumentalities may be either by requisition or contract, such as a lease.

This rule of law is stated in 67 C.J., pages 374, 375, Section 65, as follows:

"A mandatory order for, or requisition of,

May 2, 1945

private property by the government or a governmental agency for war purposes need not be in any particular form, in the absence of statutory requirement, and may be couched in the form or terms of a mere request, or may be in the form of a contract between the parties; * * *

It will not be controverted, we believe, when it is said that Article 6 of the Constitution of the United States and the Laws of the United States made in pursuance thereof, and all treaties made shall be supreme over State law.

That part of Article 6 of the Constitution of the United States so stating, is as follows:

"Supreme Law of the land.-- This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The case of Gibbons vs. Ogden, 22 U.S. (9 Wheat.) 1, was a case where a State law conflicted with an Act of Congress regarding the use of navigable waters in the State of New York. The Supreme Court of the United States, in an opinion delivered by Chief Justice John Marshall, holding the New York Act invalid and that the State laws must yield to the Constitution of the United States, and the laws of the United States enacted under the Constitution, l.c. 209, 210, said:

"Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the Court will enter upon the inquiry, whether the laws of New-York, as expounded by the highest tribunal of that State, have, in their application to this case, come into

May 2, 1945

collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New-York must yield to the law of Congress; * * *

The Supreme Court of Missouri has expressed itself respecting the right of the United States Government, under the Constitution and the Laws of the United States, to prevent any interference with its free exercise of its governmental functions by and through its agencies and instrumentalities. In the case of Preston vs. Union Pacific Railroad, 239 S.W. 1080, 1.c. 1085, in speaking of the scope and extent of control over railroads under a Presidential Order, the Court said:

"The power of the President under the act of 1916 to take over the railroads cannot be denied, and the fact that they were taken over and went into the control and possession of the Director General at 12 o'clock noon, on December 28, 1917, is established by the explicit language of the proclamation by which they were taken over. Respondent's injury, therefore, occurred during federal control. The result of federal control was absolute exclusion of the railroad companies, as owners, from the use and management of their property, * * *"

2 C.J. 419, contains the following definition of "agency",
to-wit:

"'Agency' in its broadest sense includes every relation in which one person acts for or represents another by his authority. In the more restricted sense in which the term is used in the law of principal and agent, agency

may be defined as the relation which results where one person, called the principal, authorizes another, called the agent, to act for him, with more or less discretionary power, in business dealings with third persons."

The same volume of Corpus Juris, on page 420, further states:

"* * * The term is also used in the sense of the 'instrumentality' by which a certain act is done."

Webster's New International Dictionary on page 48, defines "agency" in definition 1, as: "faculty or state of acting or of exerting power; action; instrumentality".

The same authority, page 1288, defines the noun "instrumentality" as: "Quality or state of being instrumental; that which is instrumental; means, medium; agency."

Consistently, since the case of McCulloch vs. Maryland, et al., 17 U.S. Rep. (4 Wheat.) 316, it has been held by both Federal and State Courts that the States have no right to tax any of the constitutional means employed by the United States in the execution of its constitutional powers, or otherwise, to burden the operation of its agencies or instrumentalities used to carry into effect its governmental functions. On this subject the McCulloch Case, supra, l.c. 426, said:

"This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them.
* * * "

And again, l.c. 430, said:

"We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise."

And again, l.c. 432, said:

"If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States."

There are numerous decisions by the Supreme Court of the United States and other Federal Courts, holding that Congress must give its express consent by legislation, for any agency or instrumentality of the United States, to be regulated or taxed before any such regulation or the imposition of a tax may be imposed by any of the several states. The case of *Posey vs. T.V.A.*, 93 Fed. Rep. (2d) 726, is a case announcing that rule, where, l.c. 727, the Court held:

"* * * The great functions of the Authority are governmental in nature and might have been performed directly by the officers of government. But a corporation consisting of three publicly appointed officials was created, and by section 4(b) of the act, 16 U.S.C.A. Sec. 831c(b), it was given power to sue and be sued in its corporate name. Notwithstanding the corporate entity and its subjection to suit, the Authority is plainly a governmental agency of the United States, and except as Congress may otherwise consent, is free from state regulation or control. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Johnson v. Maryland*, 254 U.S. 51, 41 S. Ct. 16, 65 L. Ed. 126.
* * * "

The same rule was stated in the case of Owensboro National Bank vs. Owensboro, 173 U.S. Rep. 664, l.c. 668, where the Court said:

"It follows then necessarily from these conclusions that the respective States would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress."

The Supreme Court of the United States in the case of Mayo et al. vs. United States, 319 U.S. Rep. 441, a case involving the identical principle and question here involved, whether the States could require an inspection fee or stamp tax to be paid by an instrumentality or agency of the United States in operating such agency or instrumentality, was before the Court. The Supreme Court of the United States held that such agencies, instrumentalities and property of the United States used by it in governmental activities were immune from State taxation. The Court, l.c. 445, said:

"Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article VI. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state. No other adjustment of competing enactments or legal principles is possible."

Again the opinion, l.c. 446, states:

"It lies within Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities. No such permission is granted here. * * *"

May 2, 1945

The case of United States Spruce Production Corporation vs. Lincoln County, et al., 285 Fed. Rep. 388, was a case where Lincoln County, in the State of Oregon, passed an Act levying a tax upon property of the Government, including lands, timber, saw mills, rights of way, and manufacturing plants operated by the United States for war purposes. In holding that the tax was invalid for lack of State authority to tax governmental agencies, and holding that the enterprise was a governmental agency, l.c. 390, the Court said:

"By the celebrated case of McCulloch v. State of Maryland, 4 Wheat. 316, 4 L. Ed. 579, it was held that the state of Maryland could not lawfully, in view of the federal Constitution, levy a tax upon the currency of a bank incorporated by act of Congress, but that it might tax the real property of the bank. The same doctrine was held and applied in Railroad Co. v. Peniston, 18 Wall. 5, 21 L. Ed. 787, where a tax upon the railroad was upheld. The cases seem to be uniform in support of the principle, which is concretely stated in Thomson v. Union Pacific Railroad, 9 Wall. 579, 591 (19 L. Ed. 792), in the following language: * * * "

* * * * *

"The exemption of agencies of the federal government from taxation by the states is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power."

The Courts of the several States have recognized, as they must, the rule that the States have no authority to levy

May 2, 1945

a tax of any character upon any instrumentality or agency of the United States Government. There were three cases involving almost the identical facts here involved, decided by the Supreme Court of South Carolina, 173 S. E. 284. There a tax was levied for license plates to be attached to automobiles used by the United States Government. Here the question is whether the United States Government shall pay for the motor fuel used by the Transportation Systems now being operated by it under said Presidential Executive Order #9462. The three South Carolina cases were consolidated and heard together by the Supreme Court of that State, because they involved the same question. The Court, in pronouncing said tax invalid, l.c. 289, said:

"It is clear that the state may not tax the instrumentalities of the general government. But it is urged by the highway department that the license fee for automobiles is not a tax, but is a valid exercise of the police power of the state. If the force of that argument be admitted, that does not save the situation. It would still be a burden imposed by the state upon an instrumentality of the general government."

The Constitution of the United States, the Laws of the United States, the decisions of the Supreme Court of the United States, and other Federal Courts, the decisions by State Supreme Courts, and text writers, are all in harmony upon the subject matter here being considered, in stating the law to be that the United States Government is immune from paying State imposed taxes for the operation of its agencies and instrumentalities, used in carrying out its constitutional authority. No case, statute, or text authority holding to the contrary has been found.

The State of Missouri, however, has gone directly to the problem, and insofar as motor vehicle fuel taxes are concerned, Laws of Missouri, 1943, page 675, expressly exempts the United States Government from paying such fuel tax, in sub-section (f) of Section 3 and in Section 2, where it is said:

"(f) No tax shall be imposed, charged or collected with respect to the following: * * * "

Honorable George Metzger

-15-

May 2, 1945

"(2) Motor fuel sold to the United States of America or any agency or instrumentality thereof."

The authorities cited and quoted herein, including our own statute just quoted, effectively establishing the law that the United States Government and its agencies and instrumentalities are immune from paying State levied taxes, are all binding upon and admonitory to all Departments of the State of Missouri, and persons administering or executing the laws of the State to act in obedience thereto.

CONCLUSION.

It is, therefore, the opinion of this Department that the United States Government and its agencies and instrumentalities are immune and exempt from the payment of the Missouri Motor Vehicle Tax in connection with the operation of the Federally possessed properties referred to in your letter.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

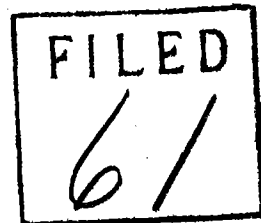
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MOTOR VEHICLE FUEL TAXES:

Naphtha when distilled and especially designed for use other than as a fuel for internal combustion engines, is not a motor vehicle fuel, and is, therefore, not subject to tax.

May 31, 1945

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The Honorable George Metzger
State Inspector of Oils
Jefferson City, Missouri

Dear Mr. Metzger:

Your letter of April 30, requesting an opinion from this Department whether under the terms of the existing motor fuel tax laws of Missouri, naphtha not used for internal combustion engines is subject to motor fuel tax, has been received. Likewise, your letter of April 12, with which you enclosed copies of correspondence between your Department and the Tankar Gas, Inc., Minneapolis, Minnesota, for my inspection was also received in due time.

Your request for an opinion on this subject has been referred to the writer for reply. Your particular request for the opinion is as follows:

"On April 12, I wrote to you, attaching copy of my letter of February 20, 1945, to the Tankar Gas, Inc., together with copy of letter dated March 13 from Bill, Maslon, Grossman & Brill, counsel for Tankar Gas, regarding the question of motor fuel tax on sales of naphtha.

"Will you please let me have your written opinion as to whether or not the sales of naphtha in this case are subject to tax under our existing Motor Fuel Tax Law."

Sub-section (b) of Section 2 of the Motor Vehicle Fuel Tax Act, Laws of Missouri, 1943, page 670, is as follows:

"'Motor Fuels' shall mean: (1) all products commonly or commercially known or sold as

May 31, 1945

gasoline (including casinghead and absorption or natural gasoline) regardless of their classifications or uses; and (2) any liquid which when subjected to distillation in accordance with the standard method of test for distillation of gasoline, naphtha, kerosene and similar petroleum products (American Society for Testing Materials Designation D-86) shows not less than ten per centum (10%) distilled (recovered) below three hundred forty-seven degrees (347°) Fahrenheit (one hundred seventy-five degrees (175°) Centigrade) and not less than ninety-five per centum (95%) distilled (recovered) below four hundred sixty-four degrees (464°) Fahrenheit (two hundred forty degrees (240°) Centigrade); provided that the term 'motor fuels' shall not include (a) naphthas and solvents, as defined in paragraph j of this section; (b) liquefied gases which would not exist as liquids at a temperature of sixty degrees (60°) Fahrenheit and a pressure of 14.7 pounds per square inch absolute; (c) denatured wood or ethyl alcohol, ether, turpentine or acetates and products having a Reid Vapor Pressure of 30 pounds or more at one hundred degrees (100°) Fahrenheit, are used as an additive in the manufacture, compounding, or blending of a liquid within (1) or (2) above, in which event the quantity so used shall be deemed to be motor fuel."

Eliminating such terms of said Section (b) relating to other liquids except naphtha, we find that in so far as naphtha is concerned the Section would read that motor fuels means all products known as gasoline; and any liquid which when subjected to distillation in accordance with standard methods of test for distillation of naphtha and similar petroleum products shows not less than 10 per centum distilled below three hundred forty-seven degrees Fahrenheit (175° Centigrade), and not less than 95 per centum distilled below four hundred sixty-four degrees Fahrenheit (240° Centigrade); provided that the term "motor fuels" shall not include (a) naphtha and solvents as defined in paragraph j of this Section.

Paragraph j of the Act on page 674, Laws of Missouri, 1943, is as follows:

"(j) 'Naphthas and Solvents' shall mean and include those liquids which come within the specifications set out under (2) of paragraph b of this section but which are especially designed for use other than as a fuel for internal combustion engines."

Paragraph j, supra, shall mean and include, so it states, "naphthas and solvents" as liquids which are especially designed for use other than as a fuel for internal combustion engines.

It would seem, therefore, if naphthas do not fall below the distillation percentage specified in (2) of sub-section (b) of Section 2 of said Act, and are especially designed for use other than as a fuel for internal combustion engines, they do not come within the definition of motor fuels and are therefore not taxable.

The Courts of this State, and of the country generally, and text writers of the law, hold that statutes creating exemptions of persons or property from payment of taxes must be construed against such exemptions.

59 C. J. 1135, states the rule as follows:

"Exemptions. In pursuance of the beneficent public policy which favors equality in the distribution of the burdens of government, all exemptions of persons or property from taxation are to be construed strictly against the exemption;
* * * "

61 C. J. 392, under the subject of taxation further states the same rule as follows:

"Unlike the rule of liberal construction which has been generally adopted with reference to exemptions from levy and sale for the payment of debts, an

May 31, 1945

alleged constitutional or statutory
grant of exemption from taxation
will be strictly construed. * * * "

In the case of B.P.O.E. vs. Koeln, 262 Mo. 444, l.c. 445, in following the same rule of strict construction of exemptions, held as follows:

"* * * 'It must be conceded to the state that whether a tax-exempting clause be viewed from the standpoint of the State down to the people, or from the standpoint of the people up to the State there must be unbending and inviolate rules which as sure words of the law are always to be reckoned with; and those rules (from the standpoint of the State) are that an abandonment of the sovereign right to exercise the vital power of taxation can never be presumed. The intention to abandon must appear in the most clear and unequivocal terms * * * ' "

In the case of State ex rel. Y.M.C.A. vs. Gehner, 11 S. W. (2d) 30, l.c. 34, our Supreme Court followed the rule by saying:

"In the construction of laws exempting property from taxation it is a cardinal principle that they must be strictly construed. As a rule all property is liable to taxation, exemption, the exception, and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. It is in no case to be assumed that the law intends to release any particular property from this obligation; and no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any

May 31, 1945

doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption.' * * * "

The conditional qualifications set up in sub-section (b) of Section 2 of said Act, and in sub-section j of said Act, are questions of fact. Under the above cited authorities, it is, we believe, in harmony with those holdings, proper to say that the Tankar Gas, Inc. may not arbitrarily determine the question whether naphtha at all events is exempt from taxation as a motor vehicle fuel. We think it must establish that the naphtha fluid which it is offering for market and marketing in this State, strictly complies with the requirements of said Section 2 of said Act of 1943, and that the Oil Inspection Department of this State is entitled to have proof furnished by said company of such fact, and that naphtha as so offered for sale and sold by said company in this State is designed especially for use other than as a fuel for internal combustion engines. We think your Department would have the right to demand and receive affidavits from purchasers and users of such naphtha as would establish the facts necessary to exempt naphtha from the terms of said Act, the same to be procured by said company for your Department.

CONCLUSION

It is, therefore, the opinion of this Department that if such facts are established that naphtha as offered for sale and sold in this State by this company or others, comes within the specifications of said sub-section (b) of Section 2 of said Act of 1943, as to distillation, and being designed for use other than as a fuel for internal combustion engines, it is exempt under the terms of said Act of 1943, from motor vehicle fuel tax, because it is under such facts and conditions defined as not being motor vehicle fuel.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

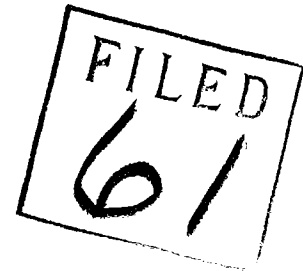
J. E. TAYLOR
Attorney General

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MOTOR VEHICLE FUEL TAX: Liability of political subdivisions of the State for payment of motor vehicle fuel tax, under the Constitution of 1945.

*Missouri
advising*

June 6, 1945



Mr. George Metzger
State Inspector of Oils
Jefferson City, Missouri

Dear Sir:

In a letter dated May 5, 1945 you requested an opinion of this department, which letter reads as follows:

"We have received letter dated May 4, 1945, from Roy Jablonsky, Surveyor and Highway Engineer of St. Louis County, which reads as follows:

"The Law Department of St. Louis County has given this office an opinion to the effect that counties, under the provisions of the new Constitution, are exempt from the payment of motor vehicle fuel tax. Accordingly, the opinion further suggests that we discontinue payment of such tax to the State of Missouri.

"In view of the foregoing, no check will be mailed to your office for gasoline purchases consummated after May 1st, 1945."
(Signed) Roy Jablonsky.

"There has been introduced in the Senate Bills Nos. 123 and 124, which if passed would amend the present Motor Fuel Tax Law to exempt the State of Missouri or political subdivisions thereof, or any municipality of the State of Missouri, from payment of tax.

"We would appreciate receiving your written opinion on this subject at the earliest date possible."

Liability for the payment of motor vehicle fuel tax is

presently imposed by the provisions of Section 3 of an act found in Laws of Mo. 1943, pages 670-699, which reads, in part, as follows:

"(a) In order to provide funds for the construction and maintenance of the public highways of this state and to pay the principal and interest on the road bonds of the State there is hereby provided for a license tax to produce a sum equal to two cents (2¢) on each gallon of motor fuel used in propelling motor vehicles upon the public highways of Missouri to be collected as hereinafter provided.

"(b) For the privilege of receiving motor fuel to be sold for use in propelling motor vehicles upon the public highways of this state, there is hereby imposed upon every person receiving fuel in this state, a license tax equal to two cents (2¢) per gallon on all motor fuel received to be sold for use in propelling motor vehicles upon the public highways of this state. It shall be presumed that all motor fuel received in this state is to be sold for use and will be used in propelling motor vehicles upon the public highways.

* * *

"(e) Every person purchasing motor fuel in this state from any distributor or other person, shall pay, except as otherwise provided herein, to the distributor or other person from whom said fuel is purchased, the amount of the license tax which the distributor or other person is required by this act to add to the selling price of the motor fuel. It shall be presumed that all fuel purchased by any person in this state is intended to be used and will be used to propel motor vehicles upon the public highways of this state."

The term "person" is further defined by subsection (d) of Section 2 of the act, reading as follows:

"'Person' shall mean and include natural persons, partnerships, firms, associations and corporations, any representative appointed by any court, the state, its

June 6, 1945

departments and political subdivisions, the United States and any department, agency or instrumentality thereof, in so far as the Constitution and Laws of the United States do not prohibit the taxation thereof by the State of Missouri, and the use of the singular number shall include the plural number. 'Political subdivisions of the state' as used herein is intended to be all inclusive and shall include any county, township, road district, sewer district, school district, municipality, town or village, or any other public corporation, whether of like character as those heretofore enumerated or not, that is an agency for the administration of civil government."

The exemptions from payment of the tax are set out in Section 3, as follows:

"(f) No tax shall be imposed, charged or collected with respect to the following:

(1) Motor fuel exported or sold for export from this state to any other state, territory, or foreign country, except in the usual and ordinary fuel supply tank connected with the engine of a motor vehicle leaving this state.

"(2) Motor fuel sold to the United States of America or any agency or instrumentality thereof.

"(3) Motor fuel sold to any post exchange or concessionaire on any Federal reservation within this state; but the tax on motor fuel so sold, to the extent permitted by Federal Law, shall be paid to the state by such post exchange or concessionaire.

"(4) Motor fuel sold to any person for use in the performance of any such person's cost-plus-a-fixed-fee or fixed percentage contract with the United States, or cost-plus-a-fixed-fee or fixed percentage contract under such contract, for the construction, manufacture or operation of the United States Government defense projects connected with the prosecution of any war declared by Congress.

June 6, 1945

"(5) Motor fuel used by any licensed distributor for any purposes other than the generation of power for the propulsion of motor vehicles upon the public highways.

"(6) Motor fuel received by any licensed distributor and thereafter lost or destroyed while such distributor is the owner thereof as a result of theft, leakage, fire, accident, explosion, lightning, flood, storm, act of war, or public enemy, or other like cause.

"(7) Sales or exchanges of motor fuels between licensed distributors, as provided in the second sentence of Section 3(g)."

It is therefrom apparent that no exemption exists in the Act relieving the County of St. Louis from the payment of the motor vehicle fuel tax.

We note from your letter of inquiry that the County is apparently refusing to pay the motor vehicle fuel tax for the reason that it is thought that they are exempt under certain provisions of the Constitution of 1945. We have examined the Constitution of 1945 and presume that Article III, Section 39, subsection (10) is the part thereof referred to in the opinion rendered by the Law Department of St. Louis County and mentioned in your letter. Said section reads as follows:

"The general assembly shall not have power:

* * * *

"(10) to impose a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision."

As we read your letter, two questions are presented:

(1) Is the county of St. Louis liable for payment of the gasoline tax up to July 1, 1946, which is the date provided in the Schedule of the new Constitution for the expiration of the effectiveness of all laws now in force unless these laws are sooner repealed?

June 6, 1945

(2) Is the county or any other political subdivision liable for the payment of the gasoline tax after July 1, 1946, if the present law is then still in force?

It is our opinion that the first question must be answered in the affirmative for two reasons. First, the Supreme Court of Missouri in the case of Trustees of William Jewell College in Liberty, Missouri vs. Beavers, 171 S. W. (2d) 604, ruled that a similar Constitutional prohibition against granting tax exemption in the Constitution of 1875 were prospective in nature and that the general affirmative provisions do not have the retroactive effect of repealing exemptions vested prior to the adoption of the Constitution. Under this decision the provisions of Article III, Section 39, subsection (10), were clearly prospective in nature only and can relate only to statutory enactments subsequent to the effective date of the Constitution of 1945. Second, we are of the opinion that Section 2 of the Schedule appended to the Constitution of 1945 is applicable, and we quote therefrom:

"* * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Thus the above quoted provision of Section 2 of the Schedule has the effect of keeping in full force and effect the statutory enactments found in Laws of 1943, pages 670-699, until July 1, 1946, even if they are inconsistent with other Constitutional provisions, unless such enactments are sooner repealed or amended by action of the General Assembly.

Therefore, it is our opinion that the County of St. Louis will be liable under the Motor Vehicle Fuel Tax Act, Laws of 1943, pages 670-699, until July 1, 1946, unless such law is sooner repealed or amended.

The second question involves the determination of whether the 1943 Motor Fuel Tax Act provides for a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or any political subdivision. This question is reduced to one of whether or not the Motor Vehicle Fuel Tax Act is a use or a sales tax upon property of a political subdivision. It will be seen from the wording of the

June 6, 1945

Constitutional provision herein involved that the Constitution prohibits a use or sales tax on property. Thus the word "use" cannot be taken in its broad sense and if the motor fuel tax is a tax for the use of the public highways, as distinguished from the use of specific personal or real property, the tax does not fall within the prohibition of the Constitutional provision.

It is apparent also that if the tax is not a use or sales tax of any kind, or if it is a use or sales tax on property other than that of a political subdivision, it also does not fall within the prohibition of the Constitutional provision. The questions just mentioned will both be considered in part 2 of this opinion with regard to decisions of jurisdictions other than Missouri.

Since the Missouri law would be controlling on a question of this type it will be well to examine the available law on the subject in this state.

Part I

There have been no interpretations by the Missouri courts of the sections of the 1943 Motor Vehicle Fuel Tax Act which are pertinent to the questions here involved.

Article 2 of Chapter 45, R. S. Mo., 1939, provides for a Missouri Motor Vehicle Fuel Tax Act which is similar in many respects to the 1943 Act. Although the wording of the former tax law is somewhat different, a decision of a Missouri court under that law, on the exact question presented here, would be helpful in determining the character of the tax herein involved.

The only case we find in which there is any reference, by implication or otherwise, to the character or nature of the former Act is *State vs. Banks*, (1940 Mo.), 145 S. W. (2d) 362. In that case the defendant purchased gasoline within the State of Missouri from another distributor. The latter failed to pay the tax amount into the treasury of the state. The statute provided that every distributor was liable for payment of the tax and provided for a refund to any purchaser who had paid the tax twice. The state sued to collect the gasoline

June 6, 1945

tax on the gasoline sold by the defendant, claiming that the defendant was primarily liable, although it could be reimbursed under the provisions for refund. In disposing of this case the court said:

"It is apparent, from reading the provisions of these sections together, as they now stand, that the intention of the Legislature was to require the payment of two cents on each and every gallon of gasoline sold or used in this state to operate motor vehicles over the roads, streets or highways of this state. The tax was laid, as a license tax, against distributors and dealers only. Central Transfer Co. v. Commercial Oil Co., D. C., 45 F. (2d) 400. Undoubtedly, the statute last above set out Section 7814, was intended both to authorize distributors and dealers to pass the tax on to consumers and, with the sections 7809-7813, preceding it to prevent bootlegging of gasoline for use in this state, without buying it from licensed distributors or dealers herein to evade the tax. (These provisions were added by the Legislature of 1925, Laws 1925, p. 255, to strengthen the original laws adopted by the people in 1924. Clearly, also, the intention shown by all of these laws was to collect the tax but once on each gallon of motor vehicle fuel sold or used, and this is made plain by the provisions for refund. * * *"

It is our opinion that the above statement is not too persuasive in the matter of the exact nature of the tax involved. The discussion was incidental to the main question involved and the court, though stating that the tax was laid as a license tax, also stated that the Legislature intended to tax every gallon of gasoline sold or used in this state to operate motor vehicles over its highways. Thus, it appears that the statement as to how the tax was laid was merely a statement as to the terms of the statute and not a determination of the nature of the tax.

We find two other Missouri cases which deal with the nature of any type of gasoline tax, Viquesney vs. K.C. (1924 Mo.), 266

June 6, 1945

S. W. 700; Jennings vs. St. Louis (1932 Mo.), 58 S. W. (2d) 975. These were cases involving city ordinances which were different in wording than the Missouri Motor Vehicle Fuel Tax Act. The ordinance involved in these cases specifically provided that the tax was an occupational tax or a direct privilege tax for the right of engaging in business, and there was no provision in them that the tax was to be confined to those using gasoline on the streets of the city, so that they could not be construed as taxes for compensation for the privilege of using the streets.

We are of the opinion that the difference between ^{the} city ordinances of these cases and the present State Motor Vehicle Fuel Tax Act and, in the case of State vs. Banks, supra, the lack of a direct holding on the point herein involved, plus the fact that in the latter case the opinion of the court cannot be construed as definitely determining the nature of the tax, makes it difficult to consider these cases controlling in the matter before us.

We, therefore, have gone to other jurisdictions for enlightenment as to the nature of the tax.

Part 2

The Federal Courts will follow the State's interpretations of their own statutes.

McCarroll vs. Dixie Lines, 309 U.S. 176;
John D. Bingham vs. The Golden Eagle Lines,
297 U.S. 626;
The Texas Co. vs. Blue Way Lines, 93 Fed.
(2d) 594;
Kansas City vs. Monger, 70 Fed. (2d) 361.
The Dixie Line vs. McCarroll, 23 Fed. Supp.
987.

The overwhelming majority of the state cases can be divided into two categories.

(1) Those which hold such a tax a compensation tax for the privilege of using the public highways.

June 6, 1945

(2) Those which hold that a tax similar in most respects to our Motor Fuel Tax is a license tax on the distributor measured by the sales of gasoline.

At least eight states are represented by the cases falling under the first of these classes. They are: Minnesota, Utah, South Dakota, Arkansas, Illinois, New Hampshire, Alabama and Texas. The statutes of these states have been found to be very similar in their provisions to the present Missouri law. The statutes of Minnesota, New Hampshire, South Dakota and Arkansas contain substantially the same provisions that the Missouri law now carries. That of Texas is very similar.

In *Hallett Construction Co. vs. Spaeth* (1942 Minn.) 4 N.W. (2d) 337, the Supreme Court of Minnesota held that the Motor Fuel Tax was a privilege tax as compensation for the use of the highways. The court there said, l.c. 338:

"It is quite obvious from the tenor of the amendment to Minn. Const. art. 9, sec. 5, that the people of the state were thereby authorizing a tax on gasoline used in motor vehicles which were in turn used on the public highways of the state, and that they were not attempting to authorize a general sales tax on gasoline. * * * Since the tax is imposed on the theory that it is compensation to the state for the use of its highways, the reason for exempting machinery used to improve or construct highways from a tax levied on vehicles which wear out the highways is apparent and logical. * * *"

In *Sparling vs. The Refunding Board* (1934 Ark.), 71 S. W. (2d) 182, the Supreme Court of Arkansas said, l.c. 186:

"Let it be definitely understood that the tax imposed is not a property tax, but is a privilege tax for the use of the highways* * *."

The Arkansas statute applied the tax in substantially the same manner as the Missouri law does, that it taxed all gasoline sold and used in the state, which was to be used on the highways of the state and provided that the distributor

should pay the tax. The Arkansas Court said:

"* * *The Legislature has declared the public policy of the state to be to tax all gasoline sold or used in this state for such purpose in order to prevent fraud and imposition on the state in the sale or use of a comparatively negligible quantity for other purposes."

They thus indicated that the provision for taxing the gasoline at the source was merely a safeguard against fraud perpetrated on the state by the failure to pay the tax on the part of consumers whose use of gasoline could not be readily traced. The provision for refund for non-highway use in the Arkansas statute was said to indicate the same thing.

The Sparling case was followed in the Federal Courts in the following:

Dixie Greyhound Lines vs. McCarroll, 101 Fed. (2d) 572;
McCarroll vs. Dixie Lines, 309 U.S. 176;
Dixie Lines vs. McCarroll, 22 Fed. Supp., 985;

In 101 Fed. (2d) 572, the Federal Circuit Court held that a tax under such theory must bear a reasonable relation to the use made of the highways. In the case of In re Opinion of the Justices (N.H. 1937), 190 A., 805, the New Hampshire Supreme Court held their fuel tax on gasoline was for the privilege of using highways and not a sales tax. This case was cited with approval. Tirrell vs. Johnston, (1934 N.H.), 171 A., 641, (aff. 293 U.S. 533) l.o. 644, held:

"* * *The provision that the toll is collected only on account of gasoline used 'for the propulsion of motor vehicles upon highways' (Publ. Laws c. 104, Sec. 7) is of consequence, as showing the nature of the charge."

"* * *If the sale is for other uses the charge is not made. (Publ. Laws, c. 104, Sec. 7.) The sale enters into the computation only as a measure of the amount consumed upon the highways.* * *"

In Carter vs. State Tax Commission (1939 Utah), 96 Pac.

June 6, 1945

(2d) 727, i.e. 731, the court cited an Oregon case holding that the object of the law was to fix a fee as compensation for using the roads and said:

** * *The same principle is applicable to our own law, the compensation arising in the collection of fees for the state highway fund. * * *

In State vs. City of Sioux Falls (S.D. 1932), 244 N.W. 365, the court said:

** * *Construing the various provisions together, including the refund provisions it appears that the tax in question is, in substance, a charge imposed by the state for the privilege of operating motor vehicles upon the public highways of this state.* * *

The court indicated that the quantity of motor fuel used was the yardstick adopted to measure the extent of the use of the highways. This is the usual theory of the cases under this class and under such theory the requirements of the U.S. Circuit Court in Dixie Greyhound Lines vs. McCarroll, supra, are met. The same result reached by the above cases was reached by the following cases:

Winter vs. Barrett (1933 Ill.), 186 N.E. 123;
Texas Company vs. Blue Way Lines (1937 Tex.),
93 Fed. (2d) 594;
State Tax Commission vs. County Board of Education
(1938 Ala.), 179 S. 199;
State vs. El Paso (1940 Tex. Civ. App.), 143 S.W.
(2d) 366.

The Supreme Court case of Inter-city Transit vs. Lindsay (1930), 283 U. S. 189, is helpful in determining the elements of a tax which is levied under the theory of compensation for use of the highways. The Supreme Court of the United States had before it the argument that the tax was a privilege tax

June 6, 1945

for the use of the highways. The court held the tax in question was not such a tax because the statute did not provide for the money to go into the highway fund and made a point of this fact. The court said a tax on the privilege of using the highways would have to carry the following elements:

1. The nature of the impositions must be such as to indicate a reasonable relation to highway use, such as a mileage tax proportionate to the use of the highways.

2. The statute should allocate the proceeds to highway purposes or to the general expenses of the State Highway Department. These provisions are carried in the Missouri Motor Fuel Tax Law.

begin Under the theory of this class of cases the Motor Fuel Tax Act does not provide for a tax such as would fall under the prohibition of Section 39, subsection (10) of Article III of the new Constitution, because the tax would not be a tax on the use of property.

Under the second class of cases, which hold that such a tax is a license tax on the distributor, we find a totally different theory of the tax.

This theory is that the tax is a "license" or "privilege" tax on the distributor for the privilege of selling or using gasoline. It is well to mention here that the fact that it is a license tax (relating to property) would not necessarily mean that it could not also be a use or sales tax. However, under the theory of these cases, the tax being on the distributor, the tax would not be a use or sales tax on the county of St. Louis since the privilege of user or sale which is taxed is not that by the consumer but by the distributor. The cases falling under the second class of cases are as follows:

Inter-state Transit Company vs. Lindsay, supra;
American Airways vs. Wallace, (1932), 57 Fed. (2d) 877;
U.S. vs. Lee (1943 Fla.), 13 So. (2d) 919;
Department of Highways vs. Baker (1940 N.D.), 290 N.W. 257;
State vs. Standard Oil Co. (1938 La.), 182 S. 531;

State vs. Hamilton (1940 Tenn.), 144 S. W. (2d)
749;
City of Portland vs. Kozar (1923 Ore.), 217 Pac.
833;

An examination of the above cases reveals that the statutes of most of the states which have ruled that the gasoline tax falls under the second class did not carry provisions which indicated that the tax was to be placed only upon gasoline to be sold for use or used in motor vehicles operating only on the highways of the state.

It is apparent that this class of cases go on the theory that the provision in the statute that the tax shall be passed on to the purchaser of the gasoline and added to the sale price thereof, or that this is the practical effect of the tax, does not change the character of the tax from a tax on the distributor to one on the consumer. The correctness of this theory is strengthened by the case of Alabama vs. King and Boozer (1941), 314 U. S. 1., in which the Supreme Court of the United States held that a general sales tax on a dealer or wholesaler is a tax on him and the fact that it was ultimately paid by the consumer (the U. S. Government) did not make it a tax on the Federal Government. In that case the defendant had sold materials to the United States Government under a cost-plus-fixed-fee basis and the contention was that this was a tax on the government since it actually paid it. The Supreme Court ruled against this contention. The King and Boozer case might be distinguished in that it may be argued that the Supreme Court decided it on the basis of the fact that the contractor was not an instrumentality of the government. Thus, the case would not be a holding that the fact a tax is passed on to the consumer does not affect the nature of a tax. However, in U. S. vs. Lee, supra, (1943) the Florida Supreme Court applied this rule to a Motor Fuel Tax Act, and held that the tax was on the distributor. Should the Missouri Supreme Court follow the above rule, and not distinguish the King and Boozer case on the basis mentioned above, it would rule out the possibility of the present Fuel Tax Act being a tax on the consumer in any way including one for the privilege of using the highways.

We are of the opinion that the theory that this second class of cases prevents the avoidance of the tax by St. Louis County, where the County purchases from a distributor, just as surely as

June 6, 1945

does the theory of the first class of cases. We think this second class of cases excludes the possibility of the County of St. Louis being exempt from the Motor Vehicle Fuel Tax under the provisions of Article III, Section 39, subsection (10), since this theory places the tax upon the distributor or "first source" and not upon the consumer.

We have heretofore been considering the second class of cases with relation to the situation wherein the county of St. Louis buys gasoline from a distributor. There remains to be considered the situation in the event that the county of St. Louis buys the gasoline directly from a refinery in this state. If the tax was placed upon the privilege of selling or using gasoline, it might well be argued that, under the theory of this second class of cases, the tax was a sales or use tax. This might be reasonable because, since a privilege tax might also be considered a sales or use tax, a tax which was levied against the privilege of selling or using might be considered a sales or use tax. The present Missouri law does not so levy the tax. The Missouri law taxes the privilege of receiving, and not of selling or using. The cases falling under this second class indicate that the privilege which the statute of the state, by its wording, taxes, is the privilege which determines the nature of the tax. The statutes involved in these cases, though varying in their wording, taxed the privilege of selling or using and therefore, the tax could be considered a sales or use tax on the distributor. Such is not true in the case of the Missouri Motor Vehicle Fuel Tax of 1943.

We are, therefore of the opinion that the county of St. Louis is not relieved of liability for payment of the gasoline tax in the event that it receives the gasoline directly from the refinery in this state, even under the theory of this second class of cases.

The few cases which indicate that a Motor Fuel Tax is a tax on the consumer for the privilege of using property, i.e. the gasoline, involve statutes which, we think are distinguishable from the 1943 Missouri Motor Fuel Tax Act. In *Texas Co. vs. Siefried* (1944 Wyo.), 147 Pac. (2d) 837, the Wyoming statute

taxed all gasoline and not merely that used on the public highways of the state.

In *Bingaman vs. Golden Eagle Lines*, supra, the court followed the New Mexico Supreme Court decision of *Geo. A. Breese Lumber Co. vs. Mirable*, 297 Pac. 699; 84 A.L.R. 830, which reflected the theory that the tax was not a tax for the privilege of using the highways. The New Mexico statute taxed all use of gasoline in New Mexico and the New Mexico court expressly pointed out that the statute nowhere said it was on the use of gasoline used on the highways. This, of course, indicated that a statute providing the latter would receive an entirely different construction.

Since Missouri has held that the distinction between a license and a tax depends on the purpose of the enactment (*Wilhoitt vs. City of Springfield* (1943 Mo. App.), 171 S. W. (2d) 95; *State vs. Brooker* (1928 Mo.) 11 S. W. (2d) 81, we may assume that the nature of any tax would be thus determined. If this is true it would seem that the court might well construe this tax to be for the privilege of using the highways, since the provisions of the act set out that it is for the purpose of raising a fund for road and highway department purposes and the tax is not placed on any gasoline not to be used over the state highways. A thorough examination of the cases persuades us that this result is consistently reached where the statute carries such provisions.

We are of the opinion that an additional reason for saying that Article III, Section 39, subsection (10) is not applicable to the instant situation is that reached by a consideration of another provision of the 1945 Constitution. This provision, we think, indicates a definite intention on the part of the Constitutional Convention, which is contra to a finding that the Motor Vehicle Fuel Tax falls within the provisions of Article III, Section 39, subsection (10). All the provisions of a Constitutional or statutory enactment must be considered together and resolved in an harmonious fashion.

State vs. Harris, 337 Mo. 1052; 87 S. W. (2d) 1026.
Hull vs. Baumann, 345 Mo. 159; 131 S. W. (2d) 721.

It is our opinion that Section 39, subsection (10) of Art. III should be considered in the light of Section 30, of Article IV of the new Constitution, which reads as follows:

"For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes) less the cost, (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other: * * *."

This section would seem to indicate that any Motor Fuel Taxes are incidental to the right to use the highways of the state, since motor fuel privilege taxes are included in the general grouping of revenue derived as an incident to the use of the highways of the state. Such a construction would lead one to believe that the Constitutional Convention considered the present Motor Fuel Tax Act as one for the privilege of using the highways and this would take it out of Article III, of Section 39, subsection (10) of the new Constitution. For the above reasons it is our opinion that the Motor Fuel Tax

Mr. George Metzger

-17-

June 6, 1945

Act of 1943 should be construed to be a tax on the privilege of using the highways of the State of Missouri.

CONCLUSION

It is, therefore, the opinion of this department that the county of St. Louis is liable under the Motor Vehicle Fuel Tax Act, Laws of 1943, pages 670-699, from date until July 1, 1946, because (1) the Constitution of 1945 operates prospectively and not retroactively and (2) Section 2 of the Schedule appended to the new Constitution provides that laws, even if inconsistent, shall be effective until July 1, 1946, unless sooner repealed or amended.

It is, further, the opinion of this department that under the two legal theories which together make up the great weight of authority, and for the additional reasons set out in this opinion the county of St. Louis is liable under the Motor Vehicle Fuel Tax Act, Laws of 1943, pages 670-699, after July 1, 1946, as well as from the present time until that date.

Respectfully submitted,

SMITH N. CROWE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

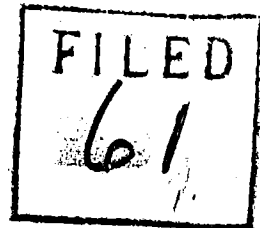
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CONSERVATION COMMISSION: Section 54 of Wildlife and
Forestry Code of Missouri
FISH AND GAME: 1944, construed.

July 6, 1945

7/19

Honorable L. E. Merrill
Prosecuting Attorney
Chariton County
Keytesville, Missouri



Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of June 27, which reads:

"I desire your opinion on the following: Section 54 of the Wildlife-Forestry Code provides that certain furs legally taken by hunter or trapper may be possessed and sold by the hunter or trapper not later than January 20th next thereafter.

"Question: If a hunter or trapper, on January 20th next after legally taking the said fur, consigns such fur to the fur buyer and such fur is not received by the fur buyer until after January 20th, that is to say, the 24th or 25th of January, has the hunter or trapper violated the terms of said Section 54?"

One of the cardinal rules of statutory construction is to try to determine from the Act, if possible, the intention of the Legislature expressed therein. The same rule is applicable to a regulation adopted by the Conservation Commission who is vested with power, under Section 16, Article XIV, Constitution of Missouri, to promulgate regulations. (See City of St. Louis v. Senter Comm. Co., 85 S. W. (2d) 21, 337 Mo. 233; Cummins v. Kansas City Public Service Co., 66 S. W. (2d) 920, 334 Mo. 672.)

Under Section 54, Wildlife and Forestry Code of Missouri 1944, no hunter or trapper may take certain fur-bearing animals

July 6, 1945

after January 15, and said hunter or trapper, under the same regulation, cannot possess and sell said furs later than the following January 20. Section 54 reads:

"Opossum, muskrat, skunk, spotted skunk (civet cat), weasel (ermine), mink, red and gray fox may be taken by pistol, rifle, gun, dog or trap, or by pistol and dog, or by rifle and dog, or by gun and dog from December 1 to January 15 next thereafter; and may be possessed and sold by the hunter or trapper not later than January 20 next thereafter. All traps so used shall be labeled as provided herein, and shall be attended daily. No metal-jawed trap may be baited or set except in dens or holes or as water sets. Nothing in this Section shall be construed as interfering in any way with the right of farmers or other property owners to take animals at any time in protection of their property as provided in Sections 27 and 99 hereof, or to prevent the running of foxes for sport as provided in Section 98."

The Conservation Commission has also defined certain terms, as used in the regulations, contained in the Wildlife and Forestry Code. "Possession" has been defined in Section 101 as follows: "Actual and constructive possession and any control of things referred to." The word "and," as used in "possession and sale," is employed disjunctively and is not synonymous with the word "or."

In *Pitcairn v. American Refrigerator Transit Co.*, 101 Fed. 929, 1.c. 937, the court said:

"The contract is limited to lines of railroad owned, controlled and operated. These subsidiaries were not owned, controlled and operated by the railroad companies. True, 'and' is sometimes read as 'or,' when necessary to effectuate an apparent intent. *Rice v. United States*, 8 Cir., 53 F. 910; *Atlantic Terra Cotta Co. v. Masons' Supply Co.*, 6 Cir., 180 F. 332. But here again, the practical interpretation of the contract by the parties to it, clearly shows that the word 'and' should not be construed as 'or.'"

July 6, 1945

See also *Marble v. Jackson*, 139 N. E. 442, 444, 245 Mass. 504.

The word "and," as commonly used, means in addition thereto, and when used in penal statutes can never be construed as "or." In *McCaull-Webster Elevator Co. v. Adams*, 167 N. W. 330, 1.c. 332, the court in so holding said:

"* * * * The word 'and' in the language above quoted is not used in an explanatory sense, but means and expresses the relation of addition. It is used as a co-ordinate conjunction and signifies that the person claiming the lien shall have a lien upon the building, erection, or improvement, and in addition to a lien upon them he also has a further or additional lien upon the land upon which the improvement is situated, or to improve which said labor was done or material furnished. * * * *"

In *Buck v. Danzenbacker*, 37 N. J. L., 359, 1.c. 361, the court said:

"* * * * A penal statute can never be extended by implication, and a case, which does not come within its words, shall not be brought within it by construction. In such a statute the word 'and' can not be construed to mean 'or.' * * * *"

From the above we are of the opinion that a hunter and trapper cannot have either actual or constructive possession of furs after January 20 following the legal taking of said furs. We are further of the opinion that if said hunter and trapper has not sold said furs on January 20, as stated in your letter, he must at least retain constructive possession of them, even though not actually in his possession.

Your request states that the hunter or trapper has consigned to the fur buyer such furs on January 20, however the fur buyer did not receive them until after January 20, and probably January 24 or 25. The word "consigned," as used in a commercial sense, carries a decided implication that the property consigned is not property of the consignee, but remains the property of the consignor; that it is merely given him for the purpose of selling same for the consignor. Therefore, it is not difficult to see the distinction between the word "sale" and the word "consignment."

July 6, 1945

In *Globe Securities Co. v. Gardner Motor Co.*, 85 S. W. (2d) 561, 1. c. 567, the court said:

" It has been said that the feature which vitally distinguishes conditional sale from consignment is that in the former the purchaser undertakes an absolute obligation to pay for the property, whereas the latter is nothing more than a bailment for sale. * * * * "

In *Edgewood Shoe Factories, etc., v. Stewart*, 107 Fed. (2d) 123, 1.c. 126, the court said:

" * * * * All agree then, that if out of the agreement itself alone, if clear and unambiguous, or out of the acts and agreements of the parties, if the agreement is of doubtful purport, there arises an obligation on the part of the apparent consignee to buy and pay for the delivered goods, such that a suit can be maintained by the consignor as creditor, the transaction is one of sale, or agreement to sell, and not of consignment for sale. Whereas, if no binding obligation to buy or pay for the goods, on which consignor could sue, arises out of the agreement alone, or out of the agreement taken with the facts, but only an obligation to account to the consignor for the proceeds of the goods when sold, the relation must be held to be, not one of buyer and seller, but one of consignor and consignee for sale. * * * * "

See also *Terminal W. & Refrigerator Co. v. Cross Transp. Co.*, 33 A. (2) 617, 1.c. 619 (4-5).

The courts in this state have also held that upon delivery of goods for shipment to a carrier, the vendor parts with title to said goods. In *Schanbacher v. Lucido Bros. Grocery Co.*, 93 S. W. (2d) 1076, 1.c. 1082, the court said:

"It was not essential to show delivery of the merchandise to the appellant in St. Louis. The showing that the merchandise was delivered to the carrier for transportation was sufficient. (Cases cited)

"Appellant contends, however, that

July 6, 1945

actual receipt and acceptance of the merchandise by appellant in St. Louis was essential under the statute of frauds. As to this contention, it will suffice to observe that the statute of frauds was not pleaded, or invoked, by objection to the evidence, or otherwise, at the trial, or in any manner called to the attention of the trial court. (Cases cited)"

See also Graff v. Foster, 67 Mo. 512, l.c. 520; State v. Rosenberger, 212 Mo. 648, l.c. 654.

Therefore, if this actually amounts to a consignment for the purpose of sale and the furs were not actually sold on January 20, then it is a violation of Regulation 54 because the hunter or trapper still holds title to said furs, at least he has constructive possession thereof. If the furs were actually sold on January 20, even though the fur buyer had not received shipment of said furs, the hunter or trapper has violated no regulation because he parted with title when said furs were delivered for shipment to the carrier.

Respectfully submitted,

AUDREY R. HAMMETT, JR.
Assistant Attorney General

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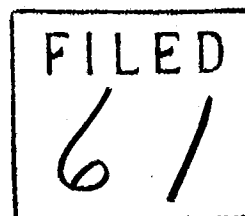
APPROVED:

J. E. TAYLOR
Attorney General

MOTOR FUEL USE LAW:

Gasoline as a motor fuel is not subject to a use tax under the Act of 1941, pages 448, 449, as amended in 1943, Laws of 1943, pages 657, 658.

September 25, 1945



Honorable George Metzger
State Inspector of Oils
Jefferson City, Missouri

Dear Mr. Metzger:

Your letter of July 27, 1945, requesting an opinion from this Department, has been received.

Your letter states:

"It has been my privilege to review a statement issued by the Southwestern Greyhound Lines, Inc., of Fort Worth, Texas, covering their operations in the State of Missouri during the month of May, 1945.

"This statement reveals the fact that their buses and coaches traveled a total of 486,294 miles over the highways of this state, and in doing so consumed or used 87,018 gallons of gasoline.

"Inasmuch as this concern does not receive or store gasoline in this state, we cannot impose a tax under our Motor Fuel Tax Law, which became effective December 1, 1943.

"However, I should like to have your opinion as to whether or not the Southwestern Greyhound Lines would be subject to payment of tax on the use of gasoline in such operations under the Motor Fuel Use Law, which became effective October 10, 1941, amended August 2, 1943."

The question you submit is whether the Southwestern Greyhound Lines, Inc., are subject to the payment of tax on

September 25, 1945

the use of gasoline in operating its busses and coaches over the highways of Missouri, under the Motor Fuel Use Law which you say became effective October 10, 1941, and which your state was amended August 2, 1943.

This evidently refers to the Act appearing in Laws of 1943, pages 657 and 658, which repealed Section 1, Laws of 1941, page 448. That Act refers only to naphtha, diesel fuel, and other gases when they are used as a fuel to propel motor vehicles on the highways of this State. It does not include gasoline.

There were two Acts passed by the Legislature of 1941, pertaining to motor fuels. Since receiving your inquiry this office has consulted with the author of both of those Acts of 1941, who was also the author of the Acts of the Session of 1943, repealing the said Acts of 1941, and re-enacting new sections in place thereof. The author of these Bills and repealing Acts and of the new provisions clarifies the situation by stating that the Act of 1941, pages 447, 448, was intended to define and refer only to gasoline.

The other Act of 1941, Laws of 1941, pages 448, 449, "Fuel" as defined on page 441, defined and referred to naphtha and other fuels not generally used in propelling automobiles on the highways of this State.

The Act of 1941, pages 448-452, was repealed, Laws of 1943, pages 657, 658, and new sections were enacted in place thereof. These new sections, it is stated by the author thereof, only apply to naphtha, diesel fuel, propane and butane gas where they may be used to propel automobiles on the highways, and does not refer to gasoline.

The Act of 1943, Laws of 1943, pages 670-699, was intended to, and does, refer only to gasoline as a motor fuel as being subject to sales tax under that Act. This was the Act which your letter evidently refers to as becoming effective December 1, 1943.

The Act of 1943, Laws of 1943, pages 670-699, resulting in the repeal of Article 2, Chapter 45, R.S. Mo. 1939, including the said Act of 1941, page 447, and the re-enacting of new sections relating to motor fuel tax, preserved the distinction and difference for tax purposes between gasoline as a motor fuel which has previously been made the subject of a use tax in the Act of 1941, page 447,

and naptha and like liquids referred to in the Act of 1941, pages 448, 449, dealing solely with naptha and such other liquids, and which was repealed Laws of 1943, page 657.

The author of these laws states that the distinction and difference was preserved between them according to standards of distillation and by subjecting naptha and such fluids to a use tax, and subjecting gasoline as a motor fuel to a sales tax, and was carried out to avoid the necessity of requiring a great number of refunds when the purchaser of gasoline is permitted to pay a sales tax at the time of purchase thereof, and if, perhaps, some of the gasoline so purchased is not used as motor fuel on the public highways, it would not be burdensome for such purchaser to get a refund on such gasoline not so used on the highways, because it is said 75% or more of gasoline purchased is used in automobiles on the public highways as a motor fuel.

The separation of gasoline as a motor fuel, and subjecting it to a sales tax as distinguished from a use tax, as was previously provided in the Laws of 1941, pages 447, 448, and as distinguishing gasoline from naptha for tax purposes thereby exempting naptha from sales tax is made clear in the Act of 1943, Laws of 1943, pages 667-699. The effect of the said 1943 Act was, and is, to clearly preserve the distinction in sub-section (b) of Section 2, Laws of 1943, pages 671, 672, between gasoline as a motor fuel, and naptha by making gasoline subject to a sales tax, whereas, the provisions of said sub-section (b) on pages 671, 672, exempts naphthas and such solvents as are defined in sub-paragraph (j) of said Section 2, on page 674, as being especially designed for use other than for internal combustion engines, from paying a sales tax.

That the distinction between the two fluids was intentionally preserved in the new enactments of Laws of 1943, supra, subjecting naptha and such products to a use tax is made more definite in the definition given of "Fuel" other than gasoline in Section 1, paragraph 2, of the Act of 1943, page 658, relating to naptha and such liquids which is as follows:

"'Fuel' shall mean all combustible gases and liquids suitable for the generation of power in an internal combustion engine except such as are subject to the tax imposed by the motor fuel tax law of this state."

September 25, 1945

The above quoted paragraph evidently refers to the sales tax required to be paid on gasoline under the Laws of 1943, pages 670-699.

The effect of these statutes is that the Act of 1943, pages 657, 658, preserves the difference and distinction between naptha and such solvents, and gasoline and subjects naptha and like liquids to a use tax as distinguished from gasoline which is subject to a sales tax. Said Act of 1943, pages 657, 658, in Laws of 1943, pages 670-699, does not include gasoline as being subject to a use tax.

CONCLUSION.

It is, therefore, the opinion of this Department that the Southwestern Greyhound Lines, Inc., would not be subject to payment of a tax on the use of gasoline in such operations as you describe under the Motor Fuel Use Law which you state became effective October 10, 1941, and which you state was amended August 2, 1943. This in fact is the Act of 1943, pages 657, 658, repealing Section 1, of the Laws of 1941, pages 448, 449, and which refers both in the said Laws of 1941, and the Laws of 1943, pages 657, 658, only to naptha, and such liquids as being subject to a use tax, and does not include gasoline.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

TAXATION :: Church property liable for real
EXEMPTION OF CHURCH PROPERTY :: estate taxes where lien for taxes
:: accrues prior to transfer of the
:: property to church use.

January 19, 1945



Honorable R. Leroy Miller
Prosecuting Attorney
Trenton, Missouri

Dear Sir:

This will acknowledge your opinion request addressed to the Office of the Attorney General on December 22, 1944, in which you inquire:

"Could you please advise me if, in your opinion, there is any way to collect real estate taxes against property which is occupied by a church, which taxes accrued before the property was diverted into church property?"

The Missouri Constitution, Article X, Section 6, provides in part as follows:

"* * * Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, * * *"

and Section 10937, R.S. Mo. 1939, is to the same effect, providing exemption from taxation of real estate when the same is used exclusively for religious worship.

Real estate occupied by a church is exempt from real estate taxes while it is being used for religious purposes. Your inquiry presents the question as to whether

January 19, 1945

real estate taxes which accrued before the property was transferred to church use may be collected against the church property, and we assume that the taxes in question were assessed and the tax levy thereon made prior to the change of the real estate to religious use.

Such real estate used for religious worship is exempt from taxation unless acquired after the accrual of a tax lien upon the property. 61 C.J. Section 560, page 483; Southern Hotel Company et al. vs. County Court of St. Louis County, 62 Mo. 134; People vs. Logan Square Presbyterian Church, 249 Ill. 9, 94 N.E. 155.

Section 10941, R.S. Mo. 1939, authorizes a lien for taxes against real property. However, the State's lien for taxes does not accrue and become a fixed incumbrance until the amount of the tax is determined by an annual assessment of the land and an annual levy of the tax. State ex rel. Martin vs. Childress, 134 S.W. (2d) 136, 345 Mo. 495; McAnally vs. Little River Drainage District, 28 S.W. (2d) 650, 325 Mo. 348.

CONCLUSION.

It is, therefore, the opinion of this department that real estate taxes against property occupied as a church which were assessed against the property, and the levy for taxes made, and the lien for taxes thereby having accrued for any year prior to the transfer of the real estate to church use, may be collected against the church property unless barred by limitation of law.

Respectfully submitted,

R. WILSON BARROW
Assistant Attorney General

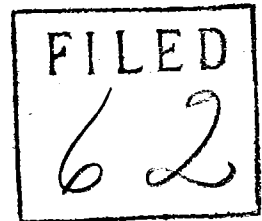
APPROVED:

HARRY H. KAY
(Acting) Attorney General

RWB:ir

CORPORATIONS: Determination of date of organization within the provisions of Sec. 5113, R. S. Mo. 1939, as amended, Laws of 1943, p. 406.

February 7, 1945



Honorable Jesse A. Mitchell
Chairman, State Tax Commission
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry under date of February 1, 1945, from which we quote:

"Is a corporation incorporated December 30, 1944, to whom a certificate of authority to do business was issued January 5, 1945, liable for corporation franchise tax for the year 1945?

"Is a corporation deemed to have been organized on the date of incorporation, or is it not to be considered organized until the certificate of authority has been issued to commence business?"

The corporate franchise tax referred to in your letter is imposed by the provisions of Section 5113, R. S. Mo. 1939, as amended, Laws of 1943, page 406. Said section contains the further proviso found on page 408:

"Provided, that no tax shall be imposed on corporations organized under the laws of this state on or after January 1, in any year, * * * for the year in which said domestic corporations were organized, * * *."

It thereupon becomes apparent that determination of the year in which the first payment of the aforesaid fran-

February 7, 1945

chise tax will be required is dependent upon the construction to be placed upon the word "organized" as used in the statutes imposing the tax.

In 18 C. J. S., Corporations, par. 63, found on page 448, we find the following:

"'Organize,' or 'organization,' as used in reference to corporations, has a well understood meaning, which is the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created."

We are of the opinion that in Missouri the legal entity is endowed with the capacity to transact its legitimate business upon the issuance of its certificate of incorporation by the Secretary of State. This view is borne out by the provisions of Section 52, found in Laws of 1943, at page 439, reading as follows:

"The corporate existence of such corporation shall date from the time of filing its articles of incorporation with the Secretary of State, * * *."

This opinion is further sustained by the case of Sylvan Beach v. Koch, decided by the United States Circuit Court of Appeals, Eighth Circuit, on February 25, 1944, and reported in 150 Fed. (2d) at page 852, l. c. 861, from which we quote:

"The Supreme Court of Missouri in Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74, 86, said:

"' * * * Moreover, whatever may be the rule in other jurisdictions, we understand the

February 7, 1945

law in this state to be that a certificate of incorporation issued by the Secretary of State is a final determination of the corporation's right to do business as such, and that thereafter the state only, by a direct proceeding, can challenge its corporate existence or its right to do business as a corporation, even though fraud should be practiced upon the Secretary of State in obtaining the certificate. Nor, should the corporation or its incorporators fail to comply with the conditions or duties subsequent to the granting of the certificate, would that invalidate the incorporation or render the incorporators liable as partners or as individuals.'

"See, also, First National Bank of Deadwood v. Rockefeller, 195 Mo. 15, 93 S. W. 761, 767; * * * "

We might add that we have given due consideration to the provisions of Section 53, found in Laws of 1943, at page 439, governing the commencement of business by any corporation, but we are of the opinion that such provisions are "conditions subsequent" and therefore not determinative of the question presented by your inquiry. In reaching this conclusion we are giving due regard to the following proviso found in said Section 53:

"Provided, nothing herein shall be construed to prevent the corporation from organizing and getting ready to do business as contemplated in its articles of incorporation;"

which indicates that the Legislature contemplated that compliance with Section 53 would not be requisite to the actual "organization" of the corporation.

Honorable Jesse A. Mitchell

-4-

February 7, 1945

CONCLUSION

In the premises, we therefore are of the opinion that a corporation which was incorporated on December 30, 1944, is to be considered "organized" on that date, within the provisions of Section 5113, R. S. Mo. 1939, as amended, Laws of 1943, at page 406; and that such corporation will be liable for the franchise tax imposed by said section for the year 1945.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

WFB:HR

DESCENTS & DISTRIBUTION:

Right of illegitimate children
to inherit.

March 30, 1945

4-5
FILED
62

Honorable Joe H. Miller
Representative, Carroll County
Missouri Legislature
Jefferson City, Missouri

Dear Mr. Miller:

Your letter of March 20, inst., directed to General Taylor requesting an opinion from this Department, whether Sections 314 and 315, R.S. Mo. 1939, are valid and in force in this State, with the letter of Mr. Ralph B. Nevins, Prosecuting Attorney of Hickory County, Missouri, attached, has been received and the matter has been assigned to the writer to write the opinion.

Your letter states:

"Enclosed herewith is a letter from the Prosecuting Attorney of Hickory County asking whether or not the law pertaining to the right of an illegitimate child to inherit is now effective.

"I would appreciate your opinion on this matter as I would like to introduce a bill to change it if is necessary."

Sections 314 and 315, R.S. Mo. 1939, were taken from the Territorial Laws of Missouri, and were enacted in 1822. These Sections will be found as Sections 7 and 8, 1 Territorial Laws, 1804-1822, page 858. The two Sections have been retained, practically without change, and carried on through the many revisions of the statutes of this State, down to and including the Revised Statutes of Missouri, 1919, and there they are numbered Sections 311 and 312.

March 30, 1945

The Legislature of this State of 1921, Laws of 1921, pages 117, 118, repealed Sections 311 and 312, R.S. Mo. 1919, and there were enacted in lieu thereof, three new Sections known as 311, 311a and 312.

Section 311a, Laws of 1921, page 118, was declared by the Supreme Court of Missouri in July, 1928, in the case of Southard vs. Short, 8 S.W. (2d) 903, to be unconstitutional.

It is well settled in every jurisdiction that an unconstitutional Act does not repeal a former valid statute.

59 C.J., section 552, pages 939 and 940, states this rule as follows:

"* * * The rule is well settled that an unconstitutional enactment will not repeal a former valid law by mere implication, and the rule is the same where the subsequent unconstitutional act declares the repeal of all acts or parts of acts inconsistent therewith, and it is apparent that the repealing statute is to be substituted for the one repealed, there being nothing that can conflict with a void statute. So where an act expressly repealing another act and providing a substitute therefor is found to be invalid, the repealing clause must also be held to be invalid, * * * "

The Supreme Court of Missouri has held in numerous cases that an original statute remained in force when a statute repealing or amending it was held unconstitutional.

The case of State vs. Hartman, et al., 299 Mo. 410, was before the Supreme Court on this precise question. In that case the Court said: (l.c. 422).

"* * * If the amendment is unconstitutional, then the old law stands. In other words if the unconstitutional amendment fails, then the law before the amendment stands. An unconstitutional amendment is no amendment, and the old law is left unaffected. (cases cited.)"

March 30, 1945

The Supreme Court had for decision a like question in the case of State vs. Clark, 275 Mo. 95. That case also involved the invalidity of an amendment to a statute. The Court held the amendment unconstitutional. In so holding, l.c. 102, the Court said:

"* * * For it is fairly well-settled that if an existing statute be amended and re-enacted, and be by the amendment rendered unconstitutional, the original statute upon the judicial declaration of invalidity comes automatically into force again. * * *"

The evident intention of the Legislature, Laws of 1921, pages 117 and 118, as expressed in the repealing Section thereof, was to repeal Sections 311 and 312, R.S. Mo. 1919, and to enact new sections in lieu thereof to be numbered and designated as Sections 311, 311a and 312, having as the object and main purpose of the repeal, the establishment, by the terms of Section 311a, of the paternity of children born out of wedlock. This, we think, is a reasonable conclusion when the three sections are read together, and especially so when it is observed that the proviso in Section 311, page 118, Laws of 1921, states that that section shall not apply except when the paternity of the child has been established by an action at law begun during the lifetime of the alleged father of such child. The proviso of said Section 311 is as follows:

"* * * Provided, however, that the provisions of this section shall not apply except in cases where the paternity of such child or children shall have been established by an action at law begun during the lifetime of the alleged father of such child."

The proviso requires compliance with the provisions of Section 311a as being first necessary in order to give life and effect to Section 311. An illegitimate child already had the right to inherit from its mother by the terms of Section 311, R.S. Mo. 1919. Nothing would be added to its

inheritable status by the re-enactment of Section 311, unless it was intended, as the proviso states, to give applicability and effect to this Section if and when a child had first had its paternity established, as is provided for in Section 311a.

The repealing Section of the Act of 1921 had as its main object, the substitution of the terms of Sections 311, 311a and 312, for Sections 311 and 312, R.S. Mo. 1919. So that here, since Section 311a, which contained the main purpose and object of the repeal, has been held invalid, the repealing Section, Section One (1) of the Act of 1921, repealing Sections 311 and 312, R.S. Mo. 1919, is also invalid and must fall with Section 311a. Sections 311 and 312, R.S. Mo. 1919, continued to be in full force and effect, and were properly later carried into the revisions of 1929 and 1939, as Sections 314 and 315, respectively, and now so appear in the Revised Statutes of Missouri, 1939.

The Supreme Court of Missouri has held in many cases that where the purpose of repeal is to repeal an old law and substitute a new law for it, the repealing section being dependent upon that purpose of substitution, necessarily is invalid when the main purpose of the Act is held invalid. It is so held in the case of *State vs. Joyce*, 307 Mo. Rep. 49, l.c. 57, where the Supreme Court said:

"* * * Suppose that all three had been embodied in a single act and that subsequently the provisions creating a municipal justices-of-the-peace court had been declared unconstitutional, then under well settled rules of construction the clause repealing the law which was to be replaced by such provisions would be held to be dependent and inoperative. 'When the evident purpose of the repeal is to displace the old law and substitute the new in its stead, the repealing section or clause, being dependent upon that purpose of substitution, necessarily falls when falls the main purpose of the act.' (*State v. Thomas*, 138 Mo. 95, 100.) We have heretofore applied the same principle to a repealing statute dependent upon another statute which was rejected by referendum. (*State ex rel. v. Dallmeyer*, 245 S.W. 1066.)"

March 30, 1945

"To recapitulate, the only statute having for any part of its purpose the repealing of the Kaw Township provisions of Section 2688, Revised Statutes 1919, was rejected by referendum, but in any event the act now relied on as operating as such a repeal fails in that respect, because the act upon which it is dependent never became effective. It follows that judgment should go for defendant confirming his title to the office in question."

Our Supreme Court on this same point in the case of State vs. Mills, 231 Mo. Rep. 493, l.c. 499, quoting Cyc., and adhering to this rule of construction, said:

"* * * So where an act expressly repealing another act and providing a substitute therefor is found to be invalid, the repealing clause must also be held to be invalid, unless it shall appear that the Legislature would have passed the repealing clause even if it had not provided a substitute for the act repealed." * * *

The case of State vs. Thomas, 138 Mo. Rep. 95, fully discusses the principles here being considered, and in holding that the original statute remained unaffected and unrepealed by an unconstitutional act undertaking to repeal the same, l.c. 99, 100, the Court said:

"Now, did the act of 1895 repeal that of 1891? Though there seems to be some conflict, or apparent conflict, in the authorities as to whether a repealing clause in an unconstitutional law repeals the original law, yet it is believed that the great weight of authority, and the better reasoning announce the negative of that position.

"As already stated, we have decided that the act of 1895 is unconstitutional and void. This being the case, we have to determine the force and effect of that repealing clause or section when considered in reference to the prior section of that act.

"On all hands it is agreed that when a law has been adjudged unconstitutional,

it is no law at all. Rights which rest, or contracts which depend, upon it, are void; it constitutes no protection to one who has acted under it; and affords no punishment to one who has refused obedience to its mandates before the decision was made. Cooley's Const. Lim. (6 Ed.), 222.

"Like the house built upon the sand, when the rains, and the floods, and the winds of judicial criticism descend, and come and blow and beat upon it, it falls, and it is as if it had never been. In short, such act being a nullity, there is nothing upon which the repealing clause can operate, because there is no law in existence which can be inconsistent or in conflict with an act void by reason of its unconstitutionality.

"The case then stands in legal contemplation, as if the repealing section were the only one enacted by the legislature, in which event but one opinion could be entertained as to the non-effectiveness of such a repealing section as that which now confronts us in the act of 1895. In other words, when, as here, the evident purpose of the repeal is to displace the old law and substitute the new in its stead, the repealing section or clause, being dependent on that purpose of substitution, necessarily falls when falls the main purpose of the act.

"Authorities very numerous abundantly sustain this position. (cases cited).

"Under these reasons and authorities it must be held that the act of 1891 remains unaffected and unrepealed by anything contained in the later act. * * *

The Supreme Court of Missouri in the case of Copeland vs. The City of St. Joseph, 126 Mo. Rep. 417, l.o. 431, on this point again said:

"Where the repealing clause of an unconstitutional law is made applicable

March 30, 1945

only to laws inconsistent with its operative provisions, then the former law is not repealed. * * *

The Act of 1931, Laws of 1931, page 130, mentioned in the accompanying letter of Mr. Nevis, attempting to repeal Sections 311, 311a and 312 of the Act of 1921, supra, has nothing to do with the case. In so far as Section 311a and the repealing clause of the Act of 1921 are concerned they were rendered invalid by our Supreme Court long before the Act of 1931, and there was nothing for the Act of 1931 to repeal. No necessity existed for the repeal of Section 1 of the Act of 1921 by the Act of 1931. It was already inoperative and void because the Section of the Act of 1921 carrying the main purpose of the Act had been rendered invalid by the Supreme Court and under other above quoted decisions of the Supreme Court, Section 1 as the repealing Section of the Act of 1921, went down with Section 311a. Sections 311 and 312, R.S. Mo. 1919, were never repealed. They were still in force as the law on that subject after the Supreme Court held Section 311a, Laws of 1921, unconstitutional, and the repealing Section of that Act likewise being invalid, they were properly carried into the Revisions of 1929 and 1939, and are now in full force and effect as the law of Missouri on the subject.

CONCLUSION.

It is, therefore, the opinion of this Department that Sections 311 and 312, R.S. Mo. 1919, were not repealed by the Act of 1921; that those two sections, now Sections 314 and 315, R.S. Mo. 1939, are in full force and effect as the statutory laws of Missouri on the subject; that under Section 314, R.S. Mo. 1939, illegitimate children are capable of inheriting and transmitting inheritance on the part of their mother, and such mother may inherit from her illegitimate child or children in like manner as if they had been lawfully begotten of her, and that under Section 315, R.S. Mo. 1939, illegitimate children may be legitimated by their father marrying their mother and recognizing the children to be his, and that such children would thereby have full legal inheritable rights.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

GWC:ir

CONSTITUTIONAL LAW: Under new Constitution magistrate may not draw compensation for performing other public duties.

Magistrates

April 10, 1945.

FILED
6-2

Honorable Edwin W. Mills
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Mr. Mills:

Under date of April 5, 1945, you wrote this office requesting an opinion as follows:

"Is an elected justice of the peace whose term expires in 1948 (permissible under Section 4 of the Schedule of the new Constitution of Missouri) prohibited by Section 24 of Article V (Judicial Department) from being appointed and serving, with compensation, as Police Judge in the City of the Fourth Class where he resides?"

Section 4 of the Schedule of the new Constitution, referred to in your letter, is as follows:

"All courts of common pleas now existing, the St. Louis courts of criminal correction, and all circuit court circuits as now established, shall continue until changed or abolished by law. The justices of the peace shall continue to hold their offices and receive the emoluments thereof until their terms of office expire, upon which their records shall be transferred to the magistrate courts."

And Section 24 of Article V of the Constitution of 1945, also mentioned in your letter, is as follows:

"All judges shall receive as salary the total amount of their present compensation

until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. The salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fees of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

A few of the elementary rules pertaining to construction of constitutional provisions are called to your attention. These are taken from Corpus Juris Secundum as follows (Vol. 16):

(Section 15, page 51)

"Generally speaking, principles of construction applicable to statutes are also applicable to constitutions, but not to the extent of defeating the purposes for which a constitution is drawn."

(Section 18, page 55)

"A clear and unambiguous constitutional provision cannot be evaded by construction because it works a hardship or absurdity, but a construction which will have such effect will be avoided if possible."

(Section 19, page 56)

"The language of a constitutional provision should be construed as it is written, unless to do so would contravene the manifest intention of its framers, and the words employed should be given their natural and obvious significance, having due regard for the rules of grammar and punctuation."

Neither of these provisions of the new Constitution contains any technical words and in construing these provisions it is necessary to give to the words their usual meaning and to give

April 10, 1945.

effect to all of the words. Going back to Section 4 of the Schedule, it unquestionably authorizes a justice of the peace, who held office at the time of the taking of effect of the new Constitution, to finish out his term of office and to receive the compensation incident to the office. Section 24 of Article V prohibits a magistrate from receiving any other compensation for any public service. A justice of the peace is a magistrate.

"In an insurance policy providing that the company shall not be liable for damage by fire which shall happen or arise by any person or persons engaged or concerned in notorious resistance to the authority of magistrates, the word 'magistrates' means public civil officers."

---Straus v. Imperial Fire Ins.
Co., 6 S. W. 698, 700, 94 Mo.
182, 4 Am. St. Rep. 368.

"In a narrower sense, the term 'magistrate' includes inferior judicial officers, such as justices of the peace, etc."

---Childers v. State, 16 S. W.
903, 905, 30 Tex App. 160, 28
Am. St. Rep. 899; Martin v.
State, 32 Ark. 124, 127.

Conclusion

Inasmuch as Section 24 of Article V of the Constitution of 1945 prohibits a magistrate from receiving any other compensation for any public service, and as a justice of the peace is a magistrate, the conclusion necessarily follows that if the justice of the peace should be appointed to serve as police judge of a city or village that under this provision of the Constitution the justice of the peace would be precluded from drawing the compensation attached to the office of police judge.

Respectfully submitted,

APPROVED:

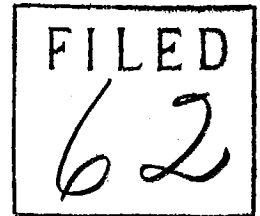
W. O. JACKSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

WOJ:EG

NEW CONSTITUTION: Section 8, Article 6 construed.

May 3, 1945



Honorable Forrest Mittendorf
Missouri State Representative
of the 63rd General Assembly
Jefferson City, Missouri

Dear Mr. Mittendorf:

We have your letter of April 26, 1945 wherein you request of this Department an opinion, which request reads as follows:

"Article 6, Section 8 of the new Constitution providing for classification of counties provides 'all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs.'"

"After the counties have been divided into the 4 classes, would a law applicable to counties within a given population range within a class or in 2 classes violate the above section of the Constitution?"

Section 8, Article 6 of the Missouri Constitution, adopted at the special election on February 27, 1945, reads as follows:

"Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and

powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

At the outset, one must be mindful of the fact that to this date there has not been an expression by the Supreme Court of this State regarding any provision of the new Constitution. However, it is our view that our Supreme Court would follow the time-honored practice and would strictly construe the provisions of the Constitution defining powers. (State ex rel. Hussman, Refrigerator and Supply Co. vs. City of St. Louis, 5 S. W. (2d) 1080, 319 Mo., 497.) Also followed in the case of State ex rel. Rosebrough Monument Co. vs. City of St. Louis, 11 S. W. (2d), page 1010. Further, where the meaning of the Constitution is plain and unequivocal and its intent is clear and unmistakable that the Courts have nothing to do with the policy of the rule established, but must accept the spirit of the rule as well as the letter and enforce it as if they believed in its wisdom. For a more accurate statement of the above rule, see the case of McGrew vs. Missouri Pacific Railway Co., 132 S. W. 1076, 230 Mo. 496; also 166 S. W. 1033, 258 Mo. 23.

Another time-honored rule, in the light of the American form of Government, is that the people of a State, in their sovereign capacity, have the power to define how much of the rights and liberties of the citizen they shall be required to sacrifice for the public good, subject to no limitations of law except the prohibition of the Federal Constitution. (Drekman vs. Stifel, 41 Mo., 184, 97 Am. Dec. 268.)

Therefore, a State Constitution is not a grant of power but is a limitation upon the power of the Legislature so that the Legislature may enact any law not expressly or inferentially prohibited by the Constitution of the State or the Nation. (State ex parte Roberts, 65 S. W. 726, 166 Mo. 207; State ex rel. Gaines vs. Canada, 113 S. W. (2d) 783, 342 Mo. 121.

Same case in, 131 S. W. (2d) 217; 344 Mo. 1238. With these rules in mind we shall now approach Section 8, Article 6 and endeavor to arrive at the intent and purpose of the people when they enacted this Section. It will first be noted that the Section provides as follows:

"Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. * * *"

We shall not endeavor to enumerate the special instances referred to be the exceptions. We do, however, point out that the term "general laws" and in this connection, we call attention to the case of State vs. Zangerle, 134 N. E. 686; 103 Ohio St. 566, where the term "general laws" was construed in the Ohio Constitution. (See Sec. 3, Article 18, thereof)

In the case of State ex rel. Attorney General vs. Lee, 99 S. W. (2d) 835, 837; 193 Ark. 270; the Court had this to say, l. c. 837:

"* * * Laws are general and uniform, not because they operate on every person in the State, for they do not, but because they operate on every person who is brought within the relations and circumstances provided for. * * *"

We see from the reading of these cases that by the term, "general laws" is meant that the law so enacted must apply to and operate uniformly on all members of any class, therefore the next sentence which reads, in said Section 8, Article 6, as follows:

"* * * The number of classes shall not exceed four and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. * * *"

To our minds this sentence is not ambiguous and merely means that the Legislature shall have the power to group all the counties of the State of Missouri into classes. By other provisions of Section 8, Article 6 of the Constitution the Legislature is limited and prohibited from exceeding the number of classifications to a number greater than four. In other words, the Legislature now has the task of setting up four classifications of counties for the State of Missouri, all of which counties must be so grouped as to be in the four classifications. We do not find that the Constitution provides any method for the Legislature to arrive at the determination by statute. As to how these four classifications are determined, that is a problem for the Legislature. But when the four classifications are determined and the counties are grouped in one of the classifications then the Legislature must follow the limitations in the next sentence to wit:

"* * * A law applicable to any county shall apply to all counties in the class to which such county belongs."

We think this sentence is not ambiguous and merely means that the people of each county shall share and share alike in the powers and restrictions that are shared by the citizens of each and every other county in that classification to which their county belongs.

Now, turning to the question presented in your opinion request, it is our view that any attempted legislation, which directly or indirectly must be considered to have created more than four classes or groups of counties would be unconstitutional and in violation of Section 8, Article 6, supra. We do not wish to be understood as meaning that any subsequent Legislature cannot change the classes as that term is used in Section 8, Article 6, supra. But it is our view that when a statute is passed if the effect of the statute, when considered with other existing statutes at the time, creates more than four classes, then that last statute would be in contravention of Section 8, Article 6.

CONCLUSION

It is, therefore, the opinion of this Department that,

Honorable Forrest Mittendorf Page 5, May 3, 1945

Section 8, Article 6 of the Constitution, approved on February 27, 1945, specifically limits the Legislature to the creation of, not to exceed four classes of counties, and that statutes, applying to only a part of the counties within any one class, would be unconstitutional.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BRC:mw

NON-PROFIT CO-OPERATIVE CORPORATIONS:

Such corporations are not required by law to file annual corporation franchise tax report.

May 4, 1945

5-8
FILED
62

State Tax Commission
of Missouri
Jefferson City, Missouri

Attention: Honorable Jesse A. Mitchell,
Chairman

Gentlemen:

This will acknowledge your letter of April 21, 1945, to General Taylor. The matter of preparing the opinion requested in your letter, has been assigned to the writer.

Your letter States:

"Will you kindly furnish the State Tax Commission your opinion on the following question:

"Is a co-operative, not organized for profit, required to file an annual corporation franchise tax report?"

Article 23, Chapter 102, R.S. Mo. 1939, covers the procedure respecting the creation of non-profit, co-operative associations, and their procedure, powers and standing, after having organized as corporate bodies.

The many sections of said Article and Chapter are too lengthy and treat of too great a variety of matters of procedure to quote in this opinion, but it will be observed by reading said Article and Chapter, that it constitutes a complete scheme of creation and existence for such non-profit, co-operative corporations. This Article and Chapter seems to permit such non-profit, co-operative associations, as corporations, to engage in almost any

May 4, 1945

enterprise they would desire to operate within the proviso of the non-profit, co-operative Marketing Act, in as much as such associations or corporations are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.

Section 5113, Laws of 1943, pages 407, 408, was an amendment of Section 5113 of Article 1, Chapter 33, R. S. Mo. 1939. This amended statute so far as exempting non-profit, co-operative corporations from paying an annual franchise tax, was identical with the old Section 5113, as it stood as a part of said Article 1, Chapter 33, R. S. Mo. 1939, in that both sections had a proviso as follows:

"Provided, that this law shall not apply to corporations not organized for profit, * * * "

(See: second proviso in Section 5113, Article 1, Chapter 33, R. S. Mo. 1939, and see, first proviso of Section 5113, Laws of 1943, page 408.)

Thus it will be seen that both the original Section 5113, and the amended Section 5113, exempted non-profit, co-operative associations from paying an annual franchise tax.

Section 5114, R. S. Mo. 1939, was not amended in the Laws of 1943, as was said Section 5113. Section 5114 provided that:

"Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri tax commission, if it is in existence, and if not, then to the state board of equalization annually on or before the first day of March in such form as said commission or said board of equalization may prescribe. * * * "

Said Section 5114, exempted such non-profit, co-operative

corporations from making the annual report to the State Tax Commission, by providing that only those corporations who were liable to pay the annual franchise tax provided for in said Section 5113, should make such report. And as we have seen, said Section 5113, R. S. Mo. 1939, having exempted such non-profit, co-operative associations or corporations from paying an annual franchise tax they were meant and intended as being the corporations exempted from making such reports by said Section 5114, R. S. Mo. 1939.

But we must now turn to the repealing clause of the new Corporation Code enacted in laws of 1943, page 410, etc., l.c. 414. We there discover that said repealing section repeals Sections 4997 to 5062, inclusive, and Sections 5065 to 5079, inclusive, and Sections 5082 to 5125, inclusive, of Article 1, Chapter 33, R. S. Mo. 1939. We then find that both Sections 5113, Laws of 1943, and 5114, R.S. Mo. 1939, would be and were included in the repeal of said Sections 5082 to 5125, inclusive, in said repealing Sections of said Act.

Now we must again turn to other sections of said Corporation Code Act, of 1943, and particularly Sections 135 and 136, on pages 475, 476 and 477, which are almost identical in their provisions as were Sections 5113, R.S. Mo. 1939, and Section 5113, Laws of Missouri, 1943, pages 407, 408, and as far as applicable, respectively, are identical with the terms of Section 5114, R. S. Mo. 1939, which was not amended by the Laws of 1943. Section 136, page 476, Laws of 1943, in the first proviso thereof, is identical in words and letters with the provision of Section 5113, in both R. S. Mo. 1939 and Laws of 1943, where they all state:

"Provided, that this law shall not apply
to corporations not organized for profit,
* * * "

Section 136, page 476, Laws of 1943, is identical with Section 5114, R. S. Mo. 1939, and which was repealed by the repealing Act of the Corporation Code Act, Laws of 1943, pages 410 and 414, in that said Section 136, uses the identical language of the said former Section, 5114, in providing that:

May 4, 1945

"Every corporation liable to the tax prescribed in the foregoing section shall make a report in writing to the Missouri tax commission, * * * "

Section 171, page 489 of said Corporation Code Act, is in its terms further affirmative of the exemption of non-profit, co-operative associations or corporations from either paying an annual franchise tax, and was exempted from making an annual report to the State Tax Commission or the State Board of Equalization as the case might be, by saying that:

"Section 171. The provisions of this Act shall be applicable to existing corporations as follows:

"(a) Those provisions of this Act requiring reports, registration statements, anti-trust affidavits, and the payment of taxes and fees, shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign, which were required to make such reports, registration statements and anti-trust affidavits, and to pay such taxes and fees, prior to the enactment of this Act."

Section 171, above quoted, in saying that only such corporations are now required to pay such tax and make such report as were required to pay such tax and make such reports prior to the enactment of this Act, directly refers to non-profit, co-operative corporations, because such non-profit, co-operative corporations were exempted from paying such tax, and making such reports by the terms of Sections 5113, 5114, R. S. Mo. 1939, and Section 5113, Laws of 1943, page 408, and as a result of such exemptions were not among classes of corporations which were required to pay such annual franchise taxes, and make such annual reports when Section 171, supra, and the remainder of the Corporations Act of 1943, was enacted.

May 4, 1945

Thus it is clear, by this additional provision, that it was the definite legislative intent that non-profit, co-operative corporations, are not required by law to pay an annual franchise tax, nor are they required by law to make or file an annual corporation franchise tax report to the State Tax Commission. They are expressly exempted from paying such tax and from making such reports by the provisions of Sections 135 and 136, Laws of Missouri, 1943, pages 475, 476 and 477.

CONCLUSION

It is, therefore, the opinion of this Department that "a co-operative, not organized for profit," is not required to file an annual corporate franchise tax report.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
Attorney-General

GWC:ir

26 Smith
TAXATION AND REVENUE: Jurisdiction of county court to abate merchant's tax.

FILED
12

12/1
November 30, 1945

Honorable Edwin W. Mills
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Sir:

Reference is made to your letter of November 20, 1945, requesting an official opinion of this office, and reading, in part, as follows:

"Has the county court the right to return to a merchant a proportionate part of the ad valorem tax he has paid in, upon his selling out or closing out?

"Or can such proportionate part of said tax be credited upon the ad valorem tax of his purchaser who proceeds to sell the same stock of goods at the same location?

* * * * *

"I hold that the first merchant must lose that part of the ad valorem tax he has paid in, and that the purchaser must make return for and pay the full tax on the stock of goods.

"However, the county court will appreciate an opinion from your office, as some of the members consider such course would result in double taxation."

The taxation of merchants is provided for by the provisions of Section 11305, R. S. Mo. 1939, reading as follows:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in March and the first Monday in June in each year: Provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

After determination of the total amount of tax due by such merchants in accordance with the further provisions of Article 18 of Chapter 74, R. S. Mo. 1939, relating to the taxation of merchants, the taxes are then certified to the county collector and thereafter by him collected as are other state and county taxes. Upon such certification to the collector, the amount thereof becomes fixed, and a duplicate of the total amount of such taxes to be collected by such collector is certified to the state auditor.

Your question then resolves itself into the jurisdiction of the county court to abate on a pro rata basis any portion of such tax so determined and certified. We do not find any cases directly construing the merchants' taxation statutes with respect to this precise point and must, in the premises, rely upon general rules of construction to determine whether or not such action may be taken.

First, we may say that we have examined all of such merchants' taxation statutes and the statutes relating to the duties of the county court in connection with the imposition and collection of such taxes and the correction of erroneous assessments made with respect thereto, and we do not find that any statutory provision has been made for remission of any portion of such taxes found to be due. We do find that provision has been made for the imposition of a merchant's tax upon a merchant engaging in business subsequent to the first Monday in June in any year, such provision being found in Section 11329, R. S. Mo. 1939, reading as follows:

"When any person or corporation shall commence the business of merchandising in any county in this state after the first Monday in June, in any year, he shall execute a bond as provided for in section 11306, conditioned that he will, on the first day of January next succeeding, furnish to the collector of his county a statement, verified as herein required, of the largest amount of goods, wares or merchandise which he had on hand or subject to his control, whether owned by himself or consigned to him for sale, on the first day of any month between the time when he commenced business as a merchant, and the said first day in January next succeeding; upon which statement he shall pay the same rate of tax as other merchants, to be estimated as the time from the day on which he commenced business to the first Monday in June next succeeding shall be to one year."

We further find that judicial construction of the statutes imposing the annual tax upon merchants indicates that such taxes are due for the full year in the event any person engaged in the business of a merchant at any time between the first Monday in March and the first Monday in June in any year, even though such business be discontinued prior to the first Monday in June.

In this regard, we direct your attention to the case of State ex rel. Fisher v. Rodecker, 145 Mo. 450, 1. e. 461, from which we quote:

" * * * if at any time between the first Monday in March and the first Monday in June of that year, Rodecker and Cohen were engaged in selling goods, wares, and merchandise at Bates county it was their duty on the first Monday in June in that year to file in the office of the clerk of the county court of that county a statement of the greatest amount of goods, wares, and merchandise which they may have had on hand at any time between those dates, whether they were in fact engaged in the mercantile business on the first Monday of June, 1894, or not.

" * * * And it is provided by section 6905, Revised Statutes, that every person or co-partnership of persons, who shall fail to file the statement, and at the time and in the manner required by section 6899, Revised Statutes, shall be deemed to have forfeited the bond given by him or them, and judgment shall be rendered for the plaintiff in damages for three times the amount of revenue which shall be found to be due for the year, * * * "

Here, at least, seems to be authority for the opinion that the taxes involved under the statutes relating to merchants are for an annual period and that, upon liability being determined, the whole sum is due without regard for the period of time in the particular year that the merchant may continue in business.

In discussing the jurisdiction of county courts, the Supreme Court, in the case of State ex rel. School District v. Jackson, 84 S. W. (2d) 988, said:

"The answer to that question depends upon the statutory powers of the county court. Such court is a creature of the Constitution, and its powers are limited by the terms of the various statutes defining its powers. It has no common-law or equitable jurisdiction."

As stated above, we do not find any specific authority in the statutes for the county court to remit any portion of a merchant's taxes, even though such merchant discontinue business during the calendar year. The only statute which might be thought to have any bearing upon the situation is Section 10998, R. S. Mo. 1939, which reads as follows:

"The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for

the purpose of correcting such errors or defects or mistakes; and where any lot of land or any portion thereof has been erroneously assessed twice for the same year, the county court shall have the power and it is hereby made its duty, to release the owner or claimant thereof upon the payment of the proper taxes. Valuations placed on property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section."

However, upon reading the statute, it becomes apparent that the duties of the county court are restricted to the correction of erroneous assessments or mistakes or defects in descriptions of lands. This not being the situation involved in the matter under consideration, we do not believe that the provisions of such statute are applicable, nor that they are such as to empower the county court to remit any portion of the merchant's tax found to be lawfully due.

CONCLUSION

In the premises, we are of the opinion that the county court has no jurisdiction nor authority to return to a merchant any portion of the taxes imposed upon such merchant under the provisions of Article 18 of Chapter 74, R. S. Mo. 1939, regardless of whether or not such merchant continues in business throughout the calendar year for which such taxes were assessed and levied.

We are further of the opinion that any merchant engaging or commencing in business prior to the first day of June in any calendar year must pay a merchant's tax in accordance with the provisions of Section 11305, R. S. Mo. 1939, such tax to be determined upon the basis of a statement to be filed in accordance with Section 11309, R. S. Mo. 1939.

We are further of the opinion that any merchant commencing in business subsequent to the first day of June in any calendar year must pay a merchant's tax to be determined in

Honorable Edwin W. Mills - 6

accordance with the provisions of Section 11329, R. S. Mo.
1939.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

W. O. JACKSON
(Acting) Attorney General

WFB:HR

BUDGETS: Budgets of counties of less than fifty thousand population are based on the valuations for 1945.

2 P Smith
December 10, 1945

FILED

62

12/18

Mr. Leo Mitchener
County Clerk
Ripley County
Doniphan, Missouri

Dear Sir:

Receipt of your request for an opinion from this office is hereby acknowledged. Your request reads as follows:

"At the request of the County Court, I am writing you for information for making up the 1946 County Budget for Ripley County. Since under the new constitution, no assessment has been made for 1946, will we base our 1946 budget on the valuations used for 1945?"

The authority for making a budget in counties of less than fifty thousand population is granted by Section 10910, R. S. Mo. 1939, which provides:

"This law may be cited and quoted as the county budget law. All counties now or hereafter having a population of fifty thousand inhabitants or less, according to the last federal decennial census, shall be governed by Sections 10910 to 10917, inclusive, of this article. Whenever the term revenue is used in this article it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by this article regardless of the source

from which derived. The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31. The receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the current year. The clerk of the county court of the several counties of this state shall be the budget officer of such county and as such shall prepare all data, estimates and other information needed or required by the county court for the purpose of carrying out the provisions of this article but no failure on the part of the clerk of the county court shall in any way excuse the county court from the performance of any duty herein required to be performed by said court. The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

With regard to the valuations to be used for the 1946 budget, Section 10915, R. S. No. 1939, provides:

"Not later than the first day of February of each year after the effective date of this article, the clerk of the county court shall prepare and spread on the docket of the county court the following information and estimate: Tax rate for all revenue purposes for last preceding year as shown by the record, cents per \$100.00 assessed valuation. Highest rate permitted for county by the Constitution per \$100.00 assessed valuation. Rate of taxation recommended as necessary by the county clerk

for current year per \$100.00 assessed valuation, cents (to be filled in by county court after budget estimate has been approved by the court). Total valuation of all property subject to taxation for last preceding year. Estimated valuation of same for current year. Amount of taxes delinquent January 1 of current year. Cash balance in county revenue fund January 1 of current year. Less outstanding warrants for preceding years as follows: (list total by years). Less all known lawful obligations against the county December 31, last, and for which warrants were not drawn at that date (itemized list of these obligations must be attached to the estimate). Total unpaid obligations of the county on January 1st of current year. (This shall include unpaid warrants and outstanding bills for which warrants may issue). Net cash balance on hand January 1st of current year. If revenue is overdrawn the estimate shall show amount of overdraft in red ink.

"ESTIMATED RECEIPTS: Cash on hand (as shown above) not obligated, January 1st of current year. If an overdraft show in red ink. Estimated from taxes for ordinary revenue for current year. Other revenue (each source shall be stated separately) estimated. Total estimated county revenue for the current year from all sources. Ten per cent shall be deducted from total for delinquent taxes to get the net amount estimated for purposes of budget. The court must balance its estimated budget for the year for the first five classes on the net estimate. If any expenditure under class six is anticipated the budget (so far as expenditure under class six is concerned) must be balanced on the actual cash on hand and not on estimated revenue." (Emphasis ours.)

These statutes are still in effect and are not in conflict with the new Constitution.

At the time the 1946 budget is made, the valuation could not be complete since the county board of equalization

Mr. Leo Mitchener - 4

meets in April and the equalization process is not completed until the full process of evaluation is at an end. Therefore, the only valuations upon which the 1946 budget can be based are the valuations used for levying the taxes collected in 1945.

CONCLUSION

The 1946 budget of counties of less than fifty thousand population is based on the valuations used for 1945.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:HR

GENERAL ASSEMBLY: Members of General Assembly ineligible for appointment to office of City Attorney of city of the fourth class.

Legislator:

April 11, 1945

FILED

4-19
64

Honorable John L. Moore
Prosecuting Attorney
Van Buren, Missouri

Dear Sir:

Reference is made to your letter under date of April 4, 1945, requesting an official opinion of this office, and reading as follows:

"Can a member of the General Assembly hold the office of City Attorney in a city of the fourth class? This is an appointive, draws only a nominal salary of \$25.00 per year, with fees for conviction and compensation for special work done for the city on order of Board of Aldermen."

In connection with the question which you have proposed, we direct your attention to Article III, Section 12, of the new Constitution of Missouri. The pertinent part thereof reads as follows:

" * * * When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or representative. * * * "

This is but a restatement of a somewhat similar provision appearing in the old Constitution of Missouri as Article IV,

Honorable John L. Moore

-2-

April 11, 1945

Section 12, which read as follows:

"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof;
* * * "

From these harmonizing sections, it seems to us that it is the public policy of the people of the State of Missouri to prohibit members of the General Assembly holding other offices under municipalities of this state or other governmental subdivisions.

CONCLUSION

In the premises, we are of the opinion that a member of the General Assembly cannot, during his term of office as such, hold the appointive position of City Attorney in a city of the fourth class.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

FEDERAL LAND BANK BONDS AND : Bonds insured by Federal Housing
OTHER BONDS NAMED IN SECTION : Administrator pursuant to Nation-
7952, LAWS OF MISSOURI, 1943, : al Housing Act must also be guar-
page 995. : anteed as to principal and in-
: terest by the Government of the
United States, otherwise they
are subject to the restrictions
of sub-section 1, of said Section
7952.

June 8, 1945

FILED

64

Honorable M. E. Morris
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Morris:

This will acknowledge your letter of May 16, 1945, requesting an opinion from this Department as to whether Federal Land Bank Bonds and other bonds named with them, are within the restrictive provisions of Section 7952, Laws of Missouri, 1943, page 995, even though such bonds are not insured or guaranteed as to principal and interest by the Government of the United States.

Your letter states:

"Subparagraph 4 of paragraph (a) of sub-division 1 of Section 7952, page 995 of the Session Acts of 1943, reads as follows:

"(a) The restrictions in this subdivision shall not apply to,

"(4) Bonds or other evidences of debt issued under the authority of the Federal Farm Loan Act as amended or issued by the Federal Home Loan Banks or the Home Owners Loan Corporation or obligations which are insured by the Federal Housing Administrator pursuant to the National Housing Act, as amended, if the debentures to be issued in such insured obligations are guaranteed as to principal and interest by the government of the United States."

"Federal Land Bank Bonds are issued under the authority of the Federal Farm Loan Act, but are not insured

June 8, 1945

or guaranteed as to principal and interest by the government of the United States.

"I shall appreciate an opinion from you as to whether the restrictive provisions of Section 7952 do not apply to Federal Land Bank Bonds even though such bonds are not insured or guaranteed as to principal and interest by the government of the United States."

Sub-section 1 of Section 7952, Laws of Missouri, 1943, page 995, provides certain restrictions upon banks subject to Article 2, Chapter 39, R. S. Mo. 1939, in making loans by certain means to individuals, partnerships, corporations, or bodies politic, comparable in percentage thereof to the capitalization of such banks, and also according to the population of cities wherein such banks may be located, excepting certain kinds of securities.

Sub-paragraph (a) of sub-section 1 of said Section 7952, states:

"(a) The restrictions in this sub-division shall not apply to,

* * * * *

"(4) Bonds or other evidences of debt issued under the authority of the Federal Farm Loan Act as amended or issued by the Federal Home Loan Banks or the Home Owners Loan Corporation or obligations which are insured by the Federal Housing Administrator pursuant to the National Housing Act, as amended if the debentures to be issued in such insured obligations are guaranteed as to principal and interest by the government of the United States."

Thus, it will be observed and understood, that the restrictions set forth in sub-section 1 apply to all securities to be purchased, such as letters or credit, by acceptance of drafts or by discount or purchase of notes, bills

of exchange or other obligations of such individual, partnership, corporation or body politic, except those specified under sub-paragraph (a) of sub-section 1, thereof. Said sub-section (4), supra, names four groups of securities affected by the terms of said Section 7952, to-wit:

1) Bonds or other evidences of debt issued under the authority of the Federal Farm Loan Act as amended.

2) Bonds issued by the Federal Home Loan Banks.

3) Bonds issued by the Home Owners Loan Corporation, or,

4) Obligations which are insured by the Federal Housing Administrator, pursuant to the National Housing Act as amended, if the debentures to be issued in such insured obligations are guaranteed as to principal and interest by the Government of the United States.

We believe the provisions of (a) supra, directly and clearly remove from the restrictions of said sub-section 1, of said Section 7952, all of the first three groups of bonds named and specified in said sub-section (4) outright.

The exemption of the last named group of said bonds specified in said sub-section (4), to-wit: obligations which are insured by the Housing Administrator pursuant to the National Housing Act, as amended, in order to be exempt from the restrictions of said sub-section 1, of said Section 7952, must be insured by the Federal Housing Administrator pursuant to the National Housing Act, and that they must also be guaranteed as to principal and interest by the Government of the United States. Stated conversely, according to the terms of said sub-section (4), if such obligations and debentures as are named in group four of said sub-section (4), are not insured by the Federal Housing Administrator pursuant to the National Housing Act, as amended, and are not also guaranteed as to principal and interest by the Government of the United States, they are subject to the restrictions contained in sub-section 1, of said Section 7952.

CONCLUSION.

It is, therefore, the opinion of this Department that the first three groups of bonds mentioned in said

June 8, 1945

sub-paragraph (4) of sub-section 1, of Section 7952, Laws of Missouri, 1943, page 995, are exempt from the restrictions of said sub-section 1, by the clear terms of said statute, and that the obligations named in group four of said sub-paragraph (4) of said sub-section 1 are subject to the restrictions contained in said sub-section of said Section 7952, unless they are insured by the Federal Housing Administrator pursuant to the National Housing Act, as amended, and if such bonds or obligations issued as insured obligations, are not also guaranteed as to principal and interest by the Government of the United States.

It is the further opinion of this Department that the restrictive provisions of Section 7952, Article 2, Chapter 39, R. S. Mo. 1939, as amended, Laws of Missouri, 1943, page 995, do not apply to Federal Land Bank Bonds even though such bonds are not insured or guaranteed as to principal and interest by the Government of the United States.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

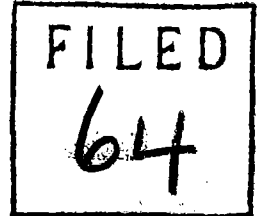
J. E. TAYLOR
Attorney General

GWC:ir

SPECIAL ROAD DISTRICTS:
COUNTY COURT:

Special road district created under Article 11, Chapter 46, R.S. Mo. 1939, cannot pay for initial cost of incorporation, neither can county court pay for same. Special road district entitled to money held by treasurer from levy on property in district, upon timely application.

June 25, 1945



Mr. Jack Moulder
Clerk of the County Court
Camden County
Camdenton, Missouri

Dear Sir:

This will acknowledge receipt of your request under date of June 1, 1945, for an official opinion from this department, which reads:

"May I have your official opinion upon the following questions:

"A special road district has just been incorporated in this county under the provisions of Article 11, Chapter 46 R.S. 1939. The petitioners for incorporation employed counsel to aid them in the preparation and presentation of the petition and in perfecting the incorporation of the district. Other expenses of the incorporation include newspaper publication fee and fee and mileage of the sheriff in posting notices of the presentation of the petition.

"Can all or any of the above items, attorney fee or court costs, be paid by the special road district from road district funds? Or can all or any of the above items be paid by the County Court?

"Should any funds in the county treasurer's hands at the date of the incorporation of the special road district to credit of the road fund of the territory now included in the special road district be now transferred to the special road district

June 25, 1945

and administered by the commissions of the special road district, or does the county court continue to administer such road money balance now on hand until it is exhausted?"

The special road district mentioned in your request was incorporated under Article 11, Chapter 46, R.S. Mo. 1939. We are unable to find any decision wherein the courts have directly passed upon the right of such a special road district to pay for the initial cost of incorporating said district.

Section 8710, R.S. Mo. 1939, provides that the county court may divide the county into special road districts and such district shall be a body corporate and possess the usual powers of a public corporation. Said section reads:

"County courts of counties not under township organization may divide the territory of their respective counties into road districts, and every such district organized according to the provisions of this article shall be a body corporate and possess the usual powers of a public corporation for public purposes, and shall be known and styled '_____ road district of _____ county,' and in that name shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of this article, or of which it may be rightfully possessed at the time of the passage of this article, and of contracting and being contracted with as hereinafter provided. Districts so organized may be of any dimensions that may be deemed necessary or advisable, except that every district shall be included wholly within the county organizing it and shall contain at least six hundred and forty acres of contiguous territory: Provided, that the county courts shall not have power to divide the territory within the corporate limits of a city having a population of 150,000 into such road district."

Under Section 8711, Laws of 1941, page 529, the procedure for incorporating such special road districts is set out and provides for the filing of a petition, properly signed by the owners of a majority of the land in said proposed district, the giving of the notice, etc., and concludes in the following manner:

" * * * Whenever an order is so made incorporating a public road district such district shall thereupon become, by the name mentioned in such order, a political subdivision of the state for governmental purposes with all the powers mentioned in this section and such others as may be conferred by law."

Certainly there is no question from a reading of the foregoing provision from Section 8711, supra, but that the General Assembly fully intended to limit such special road districts to those powers mentioned in that provision and other statutory and constitutional provisions.

In *Wheat v. Platte City Benefit Assessment Special Road District of Platte County*, and *Same v. State Highway Commission of Missouri*, 52 S.W. (2d) 856, l.c. 858, the court held that such a special road district was not a political subdivision of the state, as those terms are used in the provision of Section 12, Article VI of the Constitution of Missouri. In so holding the court said:

" * * * nor is the defendant special road district a 'political subdivision of the state in a jurisdictional sense, and within the meaning of section 12, art. 6 of the Constitution,' * * * ."

In *Wilson v. King's Lake Drainage & Levee District*, 139 S.W. 136, l.c. 140, the court likewise held that the words "other political subdivision" of the state, as used in Section 12, Article VI, following as they do the word "county," mean such political subdivisions as may be created having powers similar to those of a county, and do not refer to townships, school districts, levee districts, drainage districts, and such like minor political subdivisions of the state.

However, these decisions are based entirely upon the construction placed upon Section 12 of Article VI, which provision deals with the jurisdiction of the Supreme Court when certain

June 25, 1945

political subdivisions are parties, and does not hold that such special road districts are not political subdivisions for governmental purposes as specifically provided in the statute. We must, therefore, conclude that a special road district organized under Article 11, Chapter 46, R.S. Mo. 1939, is a body corporate and a political subdivision of the state.

As a general rule private corporations are not liable for services rendered by a promoter, however the courts have held that private corporations may pay initial expense of incorporation after the corporation has been formed, upon an implied promise to pay for same. (See *Taussig v. St. Louis and Kirkwood Railroad Co.*, 166 Mo. 28, 1.c. 38; *VanZandt v. Wholesale Gro. Co.*, 196 Mo. 640.) Furthermore, the Revised Statutes of 1939 specifically provide certain drainage districts may pay for the expense of incorporating said districts, as well as other expenses. However, in the case of incorporation of the special road districts organized under Article 11, Chapter 46, supra, this is not the case, which, at least by implication, leads us to believe that the lawmakers never intended such special road districts should pay for the incorporation of the district or they would have so provided.

Under Section 12399, R.S. Mo. 1939, before the county court may organize or incorporate any drainage district, it is required that there shall be filed with the petition a bond in the sum of not less than \$50.00 per mile, payable to the State of Missouri, signed by one or more petitioners, to be approved by the county court, conditioned for payment of all costs and expenses if the prayer of the petition be not granted, or the petition be for any cause dismissed.

The construction of drainage ditches by the county court, under Chapter 79, Article 3, R.S. Mo. 1939, Section 12400, provides that the county court may appoint one or more attorneys, satisfactory to the owners of a majority of the acreage represented, to assist the officers, and that the cost of such attorneys shall be taxed as costs in the case.

Section 8715, R.S. Mo. 1939, provides that the county court may levy a poll tax upon property within said district and further provides how said revenue shall be spent.

Section 8719, R.S. Mo. 1939, provides for costs of petition and other expenses for the construction of a special road.

In *Lindeman v. Calamus Irrigation*, 238 N.W. 762, 1.c. 763, 122 Neb. 1, the court held that irrigation districts are special

corporations whose officers' powers are limited by the statute creating them. In so holding the court said:

" * * * * In this state irrigation districts are public corporations and the powers of its officers and directors are limited by statute under which it is created. * * * * "

In *Jones v. Jefferson County Drainage Dist. No. 6*, 139 S.W. (2d) 861, 1.c. 862, the court held that drainage districts created under statutes enacted under authority of the Constitution are political subdivisions of the state of the same nature and stand on exactly the same footing as counties, or precincts, or any other political subdivisions of the state. In so holding the court said:

"Drainage districts created under the provisions of Chapter 7 of Title 128, Art. 8097, V.C.S., enacted under authority of Art. 16, Sec. 59a, of the State Constitution, Vernon's Ann. St., are political subdivisions of the state of the same nature and stand upon exactly the same footing as counties, or precincts, or any of the other political subdivisions of the state. (Cases cited) "

In *In re Bank of Anampa*, 157 Pac. 1117, 1.c. 1118, 29 Idaho 166, the court held that an irrigation district, organized under the laws of that state, is a public corporation and the treasurer of said corporation is a public officer and moneys of such district received by said treasurer are public moneys within the meaning of the statute. The court said:

"We think it will be conceded at the outset that irrigation districts organized under the laws of this state are public corporations; that the officers of such irrigation districts are elected by the electors of the district and are public officers. As such they are required to qualify and furnish an official bond for the faithful performance of the duties of their office in accordance with the law providing for the creation of irrigation districts and defining the power of such districts and the duties of the officers

of those districts. Since all officers of an irrigation district are public officers, moneys paid to the treasurer of such district would constitute a payment to and a receipt by a public officer who would be the custodian of public moneys. (Cases cited) "

One of the cardinal rules of construction is that a court must harmonize statutes, if possible, and give force and effect to each. In *Little River Drainage Dist. v. Lassater*, 29 S.W. (2d) 716, 1.c. 718, 325 Mo. 493, the court said:

"It is the duty of courts in construing two or more statutes relating to the same subject, to read them together and to harmonize them, if possible, and to give force and effect to each. 36 Cyc. 1149. * * * * *"

Therefore, since this special road district is not a private corporation, but a body corporate and a political subdivision of the state for governmental purposes, the funds belonging to the district being in the nature of a public money, said money should only be disbursed as authorized by law, and, in the absence of authority to pay for the costs of incorporation, said special road district cannot pay for same.

You further inquire if the county court may pay the costs of incorporation. We are likewise unable to find any authority for the county court to pay such costs and, in the absence of such authority, it cannot assume such burden. The county court is only the agent of the county and has only such power as is granted by law. See *Jensen v. Wilson Township, Gentry County*, 145 S.W. (2d) 372, 1.c. 374, 346 Mo. 1192, wherein the court held that a county court is only the agent of a county with no powers except those granted and limited by law, and, like all other agents, it must pursue its authority and act within the scope of its powers. In so holding the court said:

" * * * * A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. *State ex rel. Quincy, etc., Ry. Co. v. Harris*, 96 Mo. 29, 8 S.W. 794. In auditing claims a county court acts merely as the fiscal or administrative agent of the county. (Cases cited) "

June 25, 1945

Therefore, finding no statutory authority for the county court assuming the costs of the incorporation, we naturally must assume that the county court cannot pay for same.

You also inquire if any funds in the County Treasurer's hands at the date of the incorporation of a special road district, to the credit of the road fund of the territory now included in the special road district, should be transferred to the special road district and be administered by the commissioners of the special road district. The courts have, on several occasions, held that upon timely application for said funds the special road district is entitled to receive all moneys collected as taxes on property within the district; as was held in *State ex rel. Monett Special Road District v. Barry County*, 302 Mo. 279, l.c. 291, wherein the court said:

" * * * * The three sections (10682, 10683 and 10818) as they now stand do not indicate any change of the legislative purpose with respect to the distribution of road and bridge taxes collected upon property within special road districts. Section 10683 provides that all that part of the special road and bridge tax which shall be collected and paid upon property lying within any road district shall when paid into the county treasury be placed to the credit of the district from which it arose. Section 10682 which directs the levy of a road and bridge tax in connection with the general levy for county purposes makes no provision for its distribution. But Section 10818, voicing the legislative purpose with respect to special road districts, provides that all money collected 'as county taxes for road purposes, or for road and bridge purposes, by virtue of any ... law,' upon property within a special road district, shall be set aside to the credit of such special road district. The conclusion that a special road district is entitled upon timely application therefor to receive all moneys collected as taxes for road and bridge purposes upon property within its boundaries is unavoidable."

See also *State ex rel. Special Road District v. Holman*, 305 Mo. 195, and *Little Prairie Special Road District v. Pemiscot County*,

Mr. Jack Moulder

-8-

June 25, 1945

297 Mo. 568.

Conclusion.

Therefore, it is the opinion of this department that the Special Road District incorporated under Article 11, Chapter 46, R.S. Mo. 1939, cannot pay for the initial expense of incorporating said special road district; neither can the county court assume this expenditure.

Furthermore, it is the opinion of this department that the commissioners of said special road district, upon timely application, are entitled to the funds levied upon the property within the special road district for road purposes and held by the Treasurer.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:ml

SMALL LOAN COMPANIES : Commissioner of Finance
LOAN AND INVESTMENT COMPANIES : authorized by statute to
: supervise advertising.

September 17, 1945



9/20

Honorable M. E. Morris
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Morris:

Your letter of June 5, 1945, has been received.

Your letter states:

"I am enclosing a prepared statement in connection with the advertising combination circular and letter of the General Finance Loan Company, 315 North Seventh Street, St. Louis, Missouri.

"It is the intention of this Department to outline policies in connection with loan company advertising and in this connection I shall appreciate your opinion of the enclosed circular based upon the conclusions outlined in the statement."

The first paragraph of your letter states that you are accompanying your letter with a "prepared statement", which you desire also to have this office inspect. This statement seems to be a memorandum prepared by some attorney in which some of the statutes relating to the small loan business, and the loan and investment business are cited and quoted, and also included in the statement are some of the regulations heretofore adopted by the Finance Department respecting the conduct of such companies. The statement fails to cite and quote other statutes which we think bear directly upon the question submitted in your letter.

Your letter in particular, requests the opinion of this office respecting the regulation by the Finance Depart-

ment of advertising by such companies. We shall try to confine this opinion to that question although it will be necessary, and we hope helpful, to make some other observations respecting the general powers the Finance Department now has under the statutes of this State over small loan companies, and loan and investment companies.

Section 7879, Article 1, Chapter 39, R.S. Mo. 1939, is in part as follows:

"The State Department of Finance shall have charge of the execution of the laws relating to * * * * * persons, copartnerships and corporations engaged in the small loan business in this state, * * *."

That part of Section 8160, Article 7, Chapter 39, R.S. Mo. 1939, applying to the questions here being considered as to the duties of small loan companies is as follows:

"The licensee shall keep such books and records in his place of business as in the opinion of the licensing official will enable the licensing official to determine whether the provisions of this article are being observed. * * *"

Section 8161, same Article and Chapter, prohibiting small loan companies from publishing any false or misleading advertising matter, is as follows:

"No licensee under this article, shall print, publish, distribute, or cause the same to be done in any manner whatsoever, any written or printed statement with regard to the rates, terms or conditions for the lending of money, credit, goods or things in action which is false or calculated to deceive, or which shall fail to state in bold type the rate per month of interest which the licensee or other person, co-partnership or corporation, proposes to charge for the lending of money, credit, goods or things in action."

That part of Section 8155, same Article and Chapter empowering the Commissioner of Finance to revoke the license of a small loan company for cause, is as follows:

"The licensing official may, upon notice to the licensee and reasonable opportunity to be heard, revoke such license if the licensee has violated any provision of this article; * * * "

Some of the Sections of Article 8, Chapter 33, R.S. Mo. 1939, relating to loan and investment companies were repealed by the Legislature of 1943, and new Sections were enacted in lieu thereof. Among the new Sections enacted, is Section 5425a, Laws of Missouri, 1943, page 505, giving the Commissioner of Finance the same direct and positive powers, supervision and control over loan and investment companies organized under Article 8, Chapter 33, R.S. Mo. 1939, relating to the subject of loan and investment companies as he had previously, and still has over small loan companies. That part of said Section 5425a, so empowering the Commissioner of Finance, is as follows:

"The Commissioner of Finance shall have and exercise the same supervision, authority and power over, and shall be charged with the same duties toward all corporations organized under the provisions of Article 8, Chapter 33, Revised Statutes of Missouri, 1939, as he now has and exercises and is charged with by law with reference to licensees under the provisions of Article 7, Chapter 39, Revised Statutes of Missouri, 1939, as far as the same may be applicable, * * * ."

We then observe that under said Section 7879, *supra*, in the provisions for the organization of the Finance Department such Department was given charge of small loan companies.

Next, looking into the provisions of Section 8160, *supra*, we see the reason why the statute requires small loan companies to keep books and records of their transactions in their places of business. That purpose is so

September 17, 1945

that the licensing official (the Commissioner of Finance) may determine whether the provisions of Article 7, Chapter 39, are being observed under the authority given him in Section 7879, supra, over such companies.

Then the next Section of our statutes, 8161, supra, prohibits, in positive terms, false advertising upon the part of small loan companies.

For the violation of "any provision" of Article 7, Chapter 39, under Section 8155, supra, the licensing official (the Commissioner of Finance) is empowered, upon notice to the licensee, and a hearing granted him, to revoke his license.

This brings us to Section 5425a, Laws of Missouri, 1943, page 505, supra, which specifies the duty, not a mere directive, but the duty, on the part of the Finance Commissioner, to exercise the same supervision, authority and power over loan and investment companies that he has heretofore had, and now still has over small loan companies.

There is nothing equivocal about any of these statutes. They are plain and direct, and we think, confer upon the Finance Commissioner ample power, and make it his duty to exercise the supervision, control and authority over both small loan companies, and loan and investment companies, which is specified in these statutes with respect to keeping books and records, to control and determine in any reasonable way what their method of advertising shall be, and to make such other regulations of a reasonable character as will protect the public against abuses which may be indulged in by these companies, if not strictly supervised.

We think many of the statements made in the accompanying memorandum statement very properly point out violations of the statutes, and of the rules and regulations heretofore adopted by the Commissioner of Finance by the General Finance Loan Company, 315 North Seventh Street, St. Louis, Missouri.

It is apparent when one reads the advertising combination circular and letter of the said General Finance Loan Company that they are publishing false and misleading information with respect to patrons saving 40% to 50% of small loan charges. It is said in the information given in the "prepared statement" accompanying your letter, that this company has an advertisement on its window in large letters "you can save 40% to 50% of legal small loan charges!", the same as is on the first page of their combination

September 17, 1945

circular and letter.

Our attention has been called to the cases of Commonwealth vs. Reilly, 248 Mass. 1, 142 N.E. 915, and State vs. Schaengolb, 13 Ohio L. Rep. 130. These cases, while they deal with false and misleading advertisements, we think may be put aside because they involved criminal prosecutions, such as are provided for under our Section 8169, R.S. Mo. 1939, which makes the violation of any of the provisions of Article 7, Chapter 39, R.S. Mo. 1939, which would include false or misleading advertising a misdemeanor. Those cases do not refer to the question of the regulatory powers of licensing officials over such companies as small loan, and loan and investment companies. Such companies in this State could be prosecuted under said Section 8169, for false and misleading advertising, but that is not the question here. The question we are considering is the authority of the Finance Commissioner to promulgate such reasonable rules and regulations as will confine such companies to proper and legitimate advertising which in itself would avoid any violation of Section 8161, R.S. Mo. 1939, and avoid the penal provisions of said Section 8169.

Attention is also directed to the case of General Motors Corporation et al. vs. Federal Trade Commission, 114 F. (2d) 33. That was a case growing out of the broad powers given the Federal Trade Commission under the Federal Trade Act of 1914, found in Volume 38, Gen. U.S. statutes, page 717, and is also published in Title 15, Section 45, U.S.C.A. Under the provisions of that Act, the Federal Trade Commission had made a cease and desist order against General Motors Corporation for what was termed misleading and untruthful advertising. The advertisement complained of, published by the General Motors Corporation was as follows: l.c. 34:

"GMAC

"General Motors Acceptance Corporation
Reduces Time Payment Costs on New Cars
With a new 6% Plan

| | | |
|---|--|---|
| (| Simple as A, B, C |) |
| (| A- Take Your Unpaid Balance |) |
| (| B- Add Cost of Insurance |) |
| (| C*- Multiply by 6% -- 12 months' plan |) |
| (| (One-half of one percent per month |) |
| (| for periods more or less than 12 |) |
| (| months) That's your <u>whole</u> financing |) |
| (| cost. No extras. No service fees. |) |
| (| No other charges. |) |

The case itself, and the Act creating the Federal Trade Commission reveal that the Commission, under said Act, has very broad judicial powers to regulate advertising respecting competition in interstate commerce, and the power when deemed misleading, in the exercise of its discretionary and judicial powers, to cause any person or corporation indulging in false or misleading advertising to cease and desist therefrom.

The case would not furnish a precedent for the determination of the question of supervision and controlling the advertising indulged in in the instant case by one or both of the companies, one a small loan company, and the other a loan and investment company, now being considered. But because of the analogy of reasoning used in that case to the conditions here it may be made applicable to the powers of the Commissioner of Finance, although somewhat limited by construction of our statutes by our Supreme Court, in the supervision and control of advertising of small loan companies and loan and investment companies. We therefore believe it may be helpful to cite and quote, as has been suggested in said "prepared statement", the above case in part. We therefore take the liberty to quote from said case, l.c. 35, 36, the following:

"There was evidence before the Commission to support its finding that the advertisements referred to 'Have the capacity and tendency to mislead and deceive, and have misled and deceived, a substantial part of the purchasing public into the erroneous and mistaken belief that the said "6%" or "six per cent" finance plan, as above set forth, contemplates a simple interest charge of 6% per annum upon the deferred and unpaid balance of the purchase price of the motor vehicles sold * * *, and tends to cause, and has caused, such purchasing public to buy motor vehicles manufactured by General Motors because of that erroneous and mistaken belief, when in truth and in fact the total of the credit charge, computed in accordance with said "6%" or "six per cent" plan, amounts to approximately 11 $\frac{1}{2}$ % simple interest per annum upon the deferred and unpaid balance, as diminished by

the installment payments made, of the price of the motor vehicles sold to the purchasing public.'

"That the rate of interest is actually almost double 6% simple interest, as found by the Commission, is shown by Commission's Exhibit 66, which is a booklet issued by GMAC, and is not contested by General Motors or its subsidiaries. That the rate is so much greater than 6% is because the GMAC time payment plan of financing involves a 6% charge 'on the full amount of the account originally financed from the date it begins to run to the date the account is closed, regardless of the fact that the account is divided into, and amortized gradually and regularly by, monthly payments of equal amounts.'

"While we do not regard the plan used here as inevitably misleading, we think that in a good many cases it would be likely to cause the purchaser of a car to believe that he was paying an interest rate of 6% per annum upon his deferred instalments and that under it he was afforded the convenience of financing through the agency that sold the car at as good rates as he could obtain by borrowing from his bank and paying for the car in full.

"It is argued that the advertisement we have quoted could not mislead. The advertisement stated on its face: 'It is not 6% interest, but simply a convenient multiplier anyone can use and understand.' Nevertheless the calculation of the difference between a rate of 6% per annum and the amount payable under the plan would not be easy for the ignorant, as was demonstrated by the inability of at least one witness to make the calculation. Nor would the distinction be observed by the careless. The words in the fourth line of the advertisement: 'With a new 6% plan,' arrest the attention immediately and many a purchaser would not continue to read the rest

of the advertisement or digest the warning statement that the 6% was not interest, but merely a multiplier. Moreover, there was a body of advertising matter on billboards and on window posters in which no such guarded statement was made and in which the attention of the public was directed pointedly to the unexplained symbol '6%'.

"It is noteworthy that the plan involved such competitive advantages that rival companies doing a large proportion of the business of the country felt obliged to adopt and to advertise it with emphasis on the '6%' symbol. It is objected by the petitioners that the reason the plan appealed to the public and was adopted by competitors was only that the mode of calculating the instalment payments was very simple and that under the plan the finance cost of an instalment purchase was less than formerly. This really does not affect the issue of the propriety of the advertising. That, under the plan, GMAC was offering to finance instalment purchases at lower costs than before did not justify a form of advertising which has been found by the Commission, upon substantial evidence, to result in deception of the public. It may be that there was no intention to mislead and that only the careless or the incompetent could be misled. But if the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise their judgment."

We mentioned hereinabove that our Supreme Court by construction had limited the authority of the Commissioner of Finance to the exercise of such powers only as

the statutes positively prescribe he may exercise. So construing our statutes relating to the subject, our Supreme Court in the case of State ex rel. Banister et al., v. Cantley, 52 S.W. (2d), 1.c. 398, said:

"The functions of the finance commissioner, like any other official, are limited to the powers and duties imposed upon him by the statute which creates the office. 46 C.J. 1031; State ex rel. Bradshaw v. Hackmann, 276 Mo. 600, 208 S.W. 445; Lamar Township v. City of Lamar, 261 Mo. loc. cit. 189, 169 S.W. 12, Ann. Cas. 1916D, 740.

"An official such as the finance commissioner has no implied powers except such as are necessary to the effective discharge of the powers expressly conferred. 46 C.J. 1032."

The case just cited means, as we understand it, that the Commissioner of Finance may exercise such powers over persons and corporations respecting the conduct of their financial affairs as are directly granted him by statute, or as may be incidentally necessary to carry out and perform the duties placed upon him by statute.

We believe the duties cast upon the Commissioner of Finance in the statutes above quoted are positive and mandatory respecting the supervision and control of small loan, and loan and investment companies. We believe he has the duty under such statutes to establish reasonable rules to prevent such companies from publishing and distributing false and misleading advertisements. This we believe is so, because Section 8161, supra, forbids such companies from advertising, printing or distributing, or publishing in any manner whatsoever, any written or printed statement calculated to deceive or which may, in anywise, be a false statement. We believe the Commissioner of Finance would have the right to establish such rules as would keep separate the advertising of a small loan company from the advertising of a loan and investment company because of the fact that small loan companies may make loans only up to \$300 at certain rates of interest, whereas loan and investment companies may make loans above \$300 at other rates of interest, so that neither company could switch applications for loans to the other

under a misleading advertisement, or otherwise mislead the public.

We have carefully read and inspected the two sets of rules and regulations adopted by the Commissioner of Finance in April, 1944, concerning loan and investment companies, and those adopted in 1939, relating to small loan companies. We observe nothing harsh or unreasonable in these regulations. We believe they might be condensed so that they would be more readily read and understood by persons interested, but under the powers given by our statutes to the Commissioner of Finance under Sections 7879, supra, 8155, supra, and 5425a, supra, when read and construed, which they should be with the terms of Section 8161, supra, the Commissioner of Finance is given the lawful power and authority to regulate both small loan companies and loan and investment companies respecting their advertisements, and respecting their general conduct so that the Commissioner of Finance may be at any and all times kept informed of their obedience to the terms of Article 8, Chapter 33, R.S. Mo. 1939, and as amended, Laws of 1943, page 505, in said Section 5425a, and the terms of Article 7, Chapter 39, R.S. Mo. 1939.

CONCLUSION.

It is, therefore, the opinion of this Department that the said General Finance Company by the combined circular and letter, printed, published and distributed by it, violates the terms of Section 8161, supra, said company thereby makes statements with regard to the rates and charges of its loan business which are false and misleading, by stating that patrons may save 40% to 50% of small loan charges; that said combined circular and letter fails to state in bold type the rate of interest per month to be charged patrons as required by said Section 8161.

That said General Finance Company, and the GFC Corp. are violating many of the regulations adopted by the Finance Department of this State in 1944, respecting small loan companies, and in 1939, respecting loan and investment companies, in that they are advertising jointly.

That said combination, circular and letter, is not dignified and conservative in form and appearance, and that said window advertisement both in form and appearance, also violates said rules and regulations.

Honorable M. E. Morris

-11-

September 17, 1945

That said window advertisement does not state what rate of interest exclusively applies on unpaid balances to loans of \$300 or less, and that it does not distinguish between rates of interest paid small loan companies and loan and investment companies, because loan and investment companies must charge not to exceed 8% per annum on their loans which are above \$300.

That both of said companies disregard many other rules and regulations heretofore adopted as aforesaid.

It is further the opinion of this Department that the Commissioner of Finance may exercise the power granted him by the above quoted and cited statutes, to outline policies in connection with small loan company, and loan and investment company advertisements, that he may find necessary to the enforcement of said Section 8161.

Respectfully submitted,

GEORGE W. CROWLEY,
Assistant Attorney General

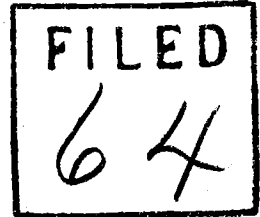
APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

GENERAL BUSINESS CORPORATIONS -- : A general business corporation
SELECTION OF CORPORATE NAME : organized to handle loans and
mortgages may not use the word
"bank" in its corporate name
under sub-paragraph (b), Sec.
7, of the Corporations Act,
Laws of Missouri, 1943.

October 4, 1945



Honorable M. E. Morris
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Morris:

Your letter of September 21, inst., requesting an opinion from this Department as to the legality of a corporation, organized for the purpose of handling loans and mortgages, adopting as its corporate name "First Bank Plan, Inc.", has been received.

Your letter states:

"Application has been filed with the Secretary of State for incorporation to handle loans and mortgages under the name 'First Bank Plan, Inc.' My thought is that the banks doing business in the same city would object to this title and I would like to inquire if there is any legal prohibition in this connection. Paragraph (b), Section 7 of the Corporations Act, Laws, Missouri, 1943, may prohibit the use of the word 'bank' in the corporate name of a company not engaged in the banking business."

Your letter calls special attention to paragraph (b), Section 7 of the Corporations Act, Laws of Missouri, 1943, page 418. Said paragraph (b) in prohibiting the use of certain words and phrases in the name of a business corporation, is as follows:

"The corporate name:

* * * * *

"(b) Shall not contain any word

October 4, 1945

or phrase which indicates or implies that it is organized for any purpose other than a purpose for which corporations may be organized under this Act."

The Legislature of this State in the new Corporations Act of 1943, Laws of 1943, page 410, l.c. 438, Section 51, gives the Secretary of State discretionary power to determine if the Articles of Incorporation of a proposed corporation submitted to him comply with the laws of this State, before he is required to issue a certificate of incorporation to the incorporators. That part of said Section 51 so providing, is as follows:

"The articles of incorporation, in duplicate, signed, sworn to and acknowledged by all the incorporators as required in section 49 shall be delivered to the office of the Secretary of State. If the Secretary of State finds that the articles of incorporation conform to law, he shall, when the required organization taxes or fees have been paid, file the same, and one of such copies shall be retained by the Secretary of State as a permanent record. The Secretary of State thereupon shall issue a certificate of incorporation under the seal of the State that said corporation has been duly organized, such certificate to set forth the name of the corporation, the amount of its authorized shares, the period of its existence and the address of its initial registered office. * * * "

In the exercise of the discretionary power with which the Secretary of State is clothed, to determine whether incorporators have complied with the laws of this State before he shall be required to issue a certificate of incorporation, he has the power, if they have not so complied with the laws of this State to refuse such certificate. The Legislature in said Act of 1943, page 489, Section 170, gives the Secretary of State broad and

October 4, 1945

comprehensive discretionary powers reasonably necessary for the enforcement and administration of the Act. Said Section 176, is as follows:

"In addition to the power and authority heretofore expressly given the Secretary of State by this Act the Secretary of State also shall have such further power and authority as is reasonably necessary to enable him to administer this Act efficiently and to perform the duties therein imposed upon him."

Incident to the evident intention of the Legislature in separating the organization of banks and the carrying on of the business of banking under a separate code, from the laws pertaining to organization and conduct of corporations generally, we cite a part of Section 7890, Article 1, Chapter 39, under the Act creating the Department of Finance of this State. That part of said Section 7890, referred to, is as follows:

"No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, of receiving deposits, of buying and selling bills of exchange, * * * * or of engaging in any other form of banking; * * *"

Section 7991, R.S. Mo. 1939, also prohibits the use by any person or corporation of any artificial or corporate name including any word or words that would indicate such business is the business of a bank. Said Section is as follows:

"No person, except a national bank, a federal reserve bank, or a corporation duly authorized by the commissioner to transact a banking business

in this state, shall make use of any office sign at the place where such business is transacted having thereon any artificial or corporate name, or other words indicating that such place or office is the place or office of a bank; nor shall any such person or persons make use of or circulate any letterheads, billheads, blank forms, notes, receipts, certificates, circulars, or any written or printed or partly written and partly printed paper whatever, having thereon any artificial or corporate name, or other word or words, indicating that such business is the business of a bank. Every person violating this provision shall forfeit the sum of one thousand dollars to the state. "

The text in Volume 7, Corpus Juris, page 473, defines a bank as follows:

"While the term 'bank' has received a number of definitions differing considerably in language, but all expressing of course the same fundamental ideas, and the sense in which it is intended to be used is largely determined by its connection with other language, perhaps the most concise and at the same time complete definition to be found in the books is that a bank is 'an association or corporation whose business it is to receive money on deposit, cash checks or drafts, discount commercial paper, make loans, * * *'"

Said Volume 7, Corpus Juris, page 477, defines banking as follows:

"Banking is the business or employment of a bank or banker; and as defined by law and custom consists of receiving deposits payable on demand, discounting commercial paper, making

loans of money on collateral security, * * *

Section 7998 of Article 2, Chapter 39, R.S. Mo. 1939, under the title of "Banks" defines a bank as follows:

"The term 'bank' shall include any person, firm, association or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check, or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing."

We find no case in this State where our Courts have passed upon the question of using the word "bank" as a part of the corporate name of a business corporation other than a banking corporation, but we do find some cases in other jurisdictions, and in Missouri, which, in principle, are analagous to the question here, some of which decisions are based upon facts more or less similar to the facts in the case submitted here.

The State of Ohio has a statute numbered 710-2, defining banks in the exact words in which our Section 7998, R.S. Mo. 1939, supra, defines a bank. That State also has a statute numbered Section 710-3 of the General Code of Ohio, confining the word "bank", "banker", "banking," or "trust," to banks as defined in the preceding Section (710-2), which, as above indicated is exactly the same as our Section 7998.

The Supreme Court of the State of Ohio had before it, in the case of Inglis v. Pontius, Superintendent of Banks, et al., 131 N.E. 509, the construction of the two above mentioned Ohio statutes. Those statutes are set out verbatim, l.c. 510, of said volume.

The facts in that case were that a firm of the name of Otis & Co. of Cleveland, Ohio, which conducted the business of brokers and dealers in investment securities, had on their letter-heads and other forms of advertising, the following name: "Otis & Co. Investment

October 4, 1945

Bankers. Cleveland."

In another advertisement the name appeared as "Otis & Co. Members -- New York Stock Exchange, Investment Bankers. Cleveland."

In still another form of advertising, was the following: "Otis & Co. Cleveland, Ohio, Investment Bankers."

The Superintendent of Banks of the State of Ohio, ordered the firm of Otis & Co. to discontinue the use of the word "bankers" in the conduct of its business, having ruled that the word "bankers" used in the advertising matter of said company constituted a violation of Section 710-3 of the Ohio General Code. It appears that the company requested the Superintendent of Banks to file an injunction against the company to test the matter. The Superintendent refused to bring such an action. Thereupon, one Inglis, one of the partners of the firm of Otis & Co., instituted the above styled suit to enjoin the firm from discontinuing the use of the word "bankers". The Superintendent of Banks was made a part defendant, and injunctive relief was sought restraining the Superintendent from bringing any action against the partnership or the individual members thereof to subject them to the penalties prescribed for the violation of said Section 710-3 of the Ohio General Code. There was a judgment for the plaintiff in the lower Court. The case was appealed to the Supreme Court of Ohio for review. Overruling the defenses made by the firm of Otis & Co., among which defenses that the word "incorporated" does not immediately follow the business title of "Otis & Co.", and, further, that "Otis & Co." had been, and was, investing portions of its funds otherwise than in those securities permissible to banks of deposit. The Court said those defenses were unimportant unless it should be claimed that Otis & Co. was in fact a bank. There was no claim that said company was a bank.

The Court then discussed the value of the word "bank" to a corporation doing a banking business, naming the many protections thrown around the banking business, both on account of the trust and confidence people of the community have, and should have, in a bank, and pointing out that the improper use of the words "bank" and "banker" might be an aid to the practise of the sale of securities of doubtful value. The Court in holding that

October 4, 1945

the adoption and use in the letter-heads and advertising matter of the firm of the words "Investment Bankers" was unauthorized and in violation of the said statutes of the State of Ohio, I.c. 511, said:

"It will be seen, therefore, that the use of the word 'bank' or 'banker' is a valuable adjunct to any business, and the protection of the provisions of the Banking Code should therefore be available only to those institutions which are subject to the regulations and restrictions imposed upon such institutions by the Banking Code.

"If we are correct in this, then it is no hardship upon any person, firm, or association to be denied the right to use the word 'bank,' or a kindred term, as part of its name or designation. All of the foregoing defines the atmosphere which was being breathed by the General Assembly in framing and adopting section 710-3, General Code, and should therefore aid in ascertaining the legislative intent."

It is true that the statute of Ohio, Section 710-3 prohibited the use of the word "bank", etc., and here in our banking code we have no such statute. But we submit that the protection in the Ohio statute of the use of the word "bank" by a corporation not doing a banking business is no stronger, as a basis for the decision of the Supreme Court of Ohio above cited and quoted, than is our sub-section (b) of Section 7, Laws of Missouri, 1943, page 418, is in prohibiting ordinary business corporations from using any word or phrase in its corporate name which would indicate or imply that it is organized for any other purpose than a purpose for which corporations may be organized under that Act. Corporations organized under the said Act of 1943, cannot do a banking business. To allow one so organized to use as its corporate name "First Bank Plan, Inc.", would, we think, give basis for the belief by the public that such corporation had some lawful financial plan in operation such as

banks, under the banking code, are permitted to employ.

In 14 Corpus Juris, page 310, the text in the latter part of Section 373, recites that in the State of New York, by statute, no corporation can be organized under the laws of the State with the word "trust," "bank," "insurance," etc., as a part of its name, except a corporation formed under the banking or the insurance laws. Under footnote 15, is cited the case of Barker v. Koenig, 119 N.Y.S. 777, in which the Supreme Court, Appellate Division, construed said statute. The opinion states the facts of the case. The opinion is not lengthy. In holding that the use of the word "Lloyds", although not expressly prohibited by the statute as a part of the corporate name of a business corporation not doing an insurance business, should not be used because the word "Lloyds" had become so generally understood and identified with insurance that it would violate the terms of said statute, the Court rendered the following opinion, to-wit:

"McLAUGHLIN, J. Wendell P. Barker and others, the appellants, desired to form a corporation under the business corporations law of the state of New York to do a general business as insurance agent or broker. They accordingly tendered to the Secretary of State a certificate of incorporation, together with the fees for filing and recording the same. The name of the proposed corporation was stated in the certificate to be 'Lloyds, New York, Incorporated.' The Secretary of State refused to file the certificate or accept the fees, on the ground that certain 'Lloyds' companies were already lawfully doing business in the state. The appellants then applied for a peremptory writ of mandamus to compel him to file and record the certificate. The application was denied, and they appeal.

"In opposition to the motion there was submitted an affidavit by the State Superintendent of Insurance, from which it appeared that an unincorporated association or partnership known as 'Lloyds, New York,' was already doing an insurance business in the state of New York. The proposed corporation was to act as agent for this

association, and objections were made, not only because of the similarity of the names, which would be likely to deceive the public, but also on the ground that the association was not lawfully entitled to do an insurance business. The Superintendent of Insurance also objected to the name chosen for the corporation on the ground that the word 'Lloyds' has become synonymous with 'insurance' and that section 6 of the general corporation law (chapter 28, p. 15, Laws 1909 (Consol. Laws. c. 23)) provides that no corporation shall be organized with the name 'insurance' in it, except a corporation formed under the banking or the insurance law. The object of the statute referred to was to prevent any corporation, except one subject to control of the insurance department, from using in its corporate name the word 'insurance' and posing as an insurance company, when it was not in fact.

"It is strenuously urged by the appellants that the word 'Lloyds' is not synonymous with 'insurance.' Nevertheless it is not and cannot be seriously denied that by the use of the word it has come to be so understood by the general public. That being so, if the proposed corporation is allowed to use the word 'Lloyds' as a part of its corporate name, when it is not an insurance corporation and cannot do an insurance business, but simply act as agent, the result necessarily will be to deceive or mislead the public, and that is precisely what the statute was designed to prevent. It is true the statute does not expressly prohibit the use of the word 'Lloyds' as a part of the name of a corporation; but its use would be none the less an imposition upon the public,

and contrary to public policy, as indicated by the statute.

"I am of the opinion, therefore, that the Secretary of State was justified in refusing to file the certificate, and the court did not err in denying the application for a peremptory writ to compel him to do so.

"The order appealed from is affirmed, * * * . All concur."

In the enactment of sub-section (b) of Section 7, supra, the evident intention of the Legislature was to point out that the name of a business corporation organized under that Act should not only be confined to the purposes for which corporations might be organized under said Act, but also that it should constitute protection to other classes of corporations organized for entirely different kinds of business, such as banks.

The word "implies" as used in said sub-section (b) supra, is the present tense of the transitive verb "imply". As such verb the word "imply" is defined in Webster's International Dictionary, page 1250, in definition 3, as: "to express indirectly; to suggest; to hint or hint at".

It seems quite likely that the public in observing such a corporate name as "First Bank Plan, Inc." would imply from the name that the corporation was carrying on some plan of financial procedure that partook of banking activities. This proposed corporation, it is said, intends to handle mortgages and loans. This statement of its purpose would indicate that the institution, if incorporated, would do a brokerage and discounting business on such securities. This could become very readily the means of confusion to, and misleading of the public as to the purpose for which the institution was organized, and also lead to the belief it was authorized to do a banking business on some plan.

CONCLUSION.

It is, therefore, the opinion of this Department that the above statutes and authorities point out a legal

October 4, 1945

prohibition as suggested in your letter to the use of the words "First Bank Plan, Inc.", by a corporation organized to handle loans and mortgages, and that it was the intention of the Legislature of this State in enacting sub-paragraph (b), Section 7, of the Corporation Act, Laws of Missouri, 1943, to prohibit the use of any word such as the word "bank", in the corporate name of a company not engaged in the banking business, and that said sub-paragraph (b) does so prohibit the same.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

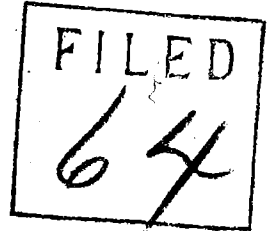
J. E. TAYLOR
Attorney General

GWC:ir

BANKS: -- Increase of capital stock:

The 60 days' notice required by Sec. 7973, Laws of Mo., 1941, page 672, is not necessary, preliminary to the increase of the capital stock of a bank, when all the stockholders of the bank waived in writing the publication thereof, and the records of such bank contain such waiver.

October 20, 1945



Honorable M. E. Morris
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Morris:

Your letter of October 6, 1945, requesting an opinion from this Department regarding the necessity of the publishing of the 60 days' notice provided for in Section 7973, R. S. Mo. 1939, where the stockholders have unanimously agreed to waive, and as a matter of record have waived the publication of such notice, preliminary to the increase of the capital stock of banks in this State, has been received. Your letter states:

"We have received from a bank under the supervision of this Department certified copy of the record of a stockholders' meeting, which reads as follows:

"We, the undersigned, Oscar D. Kochan, President and Edna Minor, Secretary of The Farmers Bank of Maysville, Maysville, Missouri, hereby certify that at a meeting of the stockholders of said bank held on the 2nd day of October 1945 pursuant to the written consent and waiver of notice of all of the stockholders of said bank as to the time, place and purpose of the meeting, a proposition was duly submitted to increase the capital stock of said The Farmers Bank from \$20,000.00 to \$25,000.00; that upon said proposition the consent of the persons holding the larger amount in value of the stock of said The Farmers Bank was given viz.: 200 votes in favor of and no votes against it; and that, therefore, the capital stock of said The Farmers Bank is hereby increased from \$20,000.00 to \$25,000.00, and that the full amount of said increase is bona fide subscribed and paid up

October 20, 1945

in cash to the board of directors of said bank.'

"(Above action was properly signed, notarized and recorded.)"

"Sec. 7973, R.S. Mo. 1939, provides for a published notice of stockholders' meeting for the purpose of increasing the capital stock of a bank. We would appreciate your advice as to whether or not this Department would be justified in issuing certificate increasing the capital of the above bank with the proceedings as set out.

"We have three similar situations pending and would appreciate your comments at the earliest possible date."

Said Section 7973, was repealed by the Legislature of 1941, and re-enacted, Laws of Missouri, 1941, page 672, as Section 7973. The essentials respecting the publication of the notice were not disturbed, but were retained in said Section 7973, Laws of Missouri, 1941, page 672.

We are of the opinion that the provisions of said Section 7973, regarding the publication of such notice before a bank may increase its capital stock are directory and not mandatory.

In the case of State ex rel. vs. Hardware Company, 178 Mo. 189, the Supreme Court of this State had before it the question of the necessity of publishing a 60 days' notice by a corporation preliminary to the increase of its capital stock. The Secretary of State refused to issue a certificate that the corporation had complied with the statutes made and provided governing its increase of capital stock. The Hardware Company case, supra, recited and discussed the previous case of State ex rel., Donnell Mfg. Co. vs. McGrath, reported in 86 Mo. 239, where our Supreme Court had upheld the Secretary of State in refusing to grant a certificate without the publication of such 60 days' notice. The McGrath case, 86 Mo. 239, was overruled by the Supreme Court in the case of Riesterer vs. Land & Lumber Co., 160 Mo. 141. The Supreme Court approved its judgment in the Land & Lumber case, supra, overruling the McGrath case, 86 Mo. 239, in the Hardware Co. case, 178 Mo. 189, l.c. 193, and announced the rule definitely that such 60 days' notice is not necessary when the stockholders express a waiver of such requirement. The Court at the local citation given above in said case, said:

"* * * and so the rule will be here announced, upon authority of the Riesterer case without further repetition of the reasons upon which it had been predicated, that corporations in this State have by the unanimous concurrence of all the stockholders thereof, in meeting assembled, the right to increase their capital stock, or bonded indebtedness, without the necessity of going through the form of giving the sixty days' public notice of the time and place of such meeting, as the Constitution and statute designate, when all the stockholders express a waiver of such requirement. Such notice could have served no useful purpose whatever, under the facts as they are made to appear in this particular, where all stockholders of relator company were present and participated in the meeting called.

"It is our opinion that the sixty days' notice does not apply to conditions like the present, and that the construction of a constitutional or statutory provision should never be adopted which results in the requirement of useless and absurd acts, except where its terms are positive and unavoidable. * * * "

The McGrath case involved the increase of the capital stock of a private manufacturing corporation. The Supreme Court in the Land & Lumber case, 160 Mo. 141, supra, exhaustively discussed and reasoned the principles herein involved as to the necessity of the publication of such notice when the stockholders have waived the publication. That was a case where a private business corporation sought the increase of its bonded indebtedness. The Hardware Co. case, 178 Mo. 189, supra, was also a case involving a private corporation in the increase of its capital stock. There is no case in our appellate decisions construing said Section 7973, on the question of the publication of such 60 days' notice therein provided for, preliminary to the increase of a bank's capital stock, when the stockholders have waived it. However, it will be noted in reading the excerpt hereinabove copied, l.c. 193, from the Hardware case, 178 Mo. 189, supra, that the Court includes all

October 20, 1945

corporations of this State, which would mean banks as well as other corporations, as being authorized to waive the publication of the 60 days' notice required by the Constitution or any statute of the State, preliminary to an increase of capital stock. We believe the decision of the Supreme Court in the Hardware Co. case, 178 Mo. 189, l.c. 193, supra, permits banks in this State to increase their capital stock without the publication of the 60 days' notice required by said Section 7973, when all the stockholders have signed, and the records of the corporation show a waiver of such requirement.

The construction of these statutes given by the Supreme Court in the Hardware Co. case, supra, that such 60 days' notice need not be published where the stockholders have unanimously agreed to waive such publication seems to be based upon safe and sound reasoning and principle. The increase of the capital stock of a bank undoubtedly would be to the benefit of the depositors of any such bank. It would appear that the rights of all persons dealing with the bank would be benefited and made more secure by an increase of the capital stock. The stockholders themselves would of necessity be required to provide the money necessary for the increase of the capital. It would further appear that the stockholders would be the only ones who could ever, under any conditions, object to the increase of the capital stock of a banking corporation without the 60 days' notice. Having waived the publication of the 60 days' notice provided for in said Section 7973, such stockholders would be estopped to complain or to take advantage of the failure to publish said 60 days' notice as an objection to the legality of the increase of the bank's capital stock.

CONCLUSION.

It is, therefore, the opinion of this Department that where all of the stockholders have signed a written waiver of the publication of the 60 days' notice of a proposed increase of capital required by said Section 7973, Laws of Missouri, 1941, page 673, and the records of said corporation contain such waiver it is not necessary to publish the 60 days' notice provided for in said Section 7973, but that the capital stock may be lawfully increased without the publication thereof.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

GEORGE W. CROWLEY
Assistant Attorney General

GWC:lr

ASSESSORS: Fees to be allowed for taking farm crop census, under Sec. 14030, Art. 102, R. S. Mo. 1939, as amended, Laws of Mo., 1943, page 324.

January 17, 1945



Mr. Harry J. Naylor
Assessor, Shelby County
Clarence, Missouri

Dear Sir:

Reference is made to your letter of December 20, 1944, reading as follows:

"I am writing you for information in regard to the fees allowed Assessors of the various counties of the state for taking the Farm Crop Census.

"Having been appointed by Gov. Donnell as Assessor of Shelby Co. last April, I would like to know if I am entitled to the fee of 10¢ per list, or will my compensation come under the old law of 4¢ per list."

The duties contained in the act originally imposed upon the office of county assessor by statute are found in Laws of 1919, page 110, and the law in identical words has been carried forward through each revision and now appears as Section 14030, R. S. Missouri, 1939. A comparison of the act as originally enacted and as subsequently amended by Laws of 1943, page 324, discloses that no additional duties have been imposed upon the office by the amendment, and that the sole effect of the amendment mentioned is to increase the compensation of the county assessors for discharging their duties.

The validity of the Act of 1919 with respect to the imposition of the duties enumerated therein upon

the county assessor was sustained in the case of State ex rel. Missouri State Board of Agriculture v. Woods, County Assessor, 296 S. W. 381, in which a peremptory writ of mandamus was awarded, compelling the discharge of the duties imposed upon the county assessor. It has, therefore, been judicially established that the duty of taking the farm crop census is a part of the official duties of the county assessor. That being the case, your predecessor in office would have been prohibited from receiving the additional compensation provided by the amendment enacted by the Legislature in 1943. Such prohibition is contained in Article XIV, Section 8, of the Constitution of Missouri, reading as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

This provision has been uniformly construed to prohibit the increase in compensation of a county officer during his term, unless the act providing for additional compensation also adds additional duties to the office. As has heretofore been pointed out, the amendment under consideration does not provide any additional duties, but simply increases the compensation for performing those duties previously placed upon the office.

We, therefore, conclude that your predecessor in office would not have been entitled to the additional compensation, and this, in turn, presents the question as to whether your rights as his successor are any greater. The opinion in the case of Thornsberry v. City of Campbell, 274 S. W. 847, we believe, is controlling. We quote:

" * * * But the term is fixed and the statute preventing a change in compensation is not, in our opinion, personal to the then occupant of the office, but applies to any subsequent holder of the office during the same term. 'Each official term stands by itself. The constitutional

provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a term by statute only, and in no wise refers to the individual who may incidentally happen to be the incumbent for more than one term.' State ex rel. v. Farmer, 271 Mo. 306, 100. cit. 314, 196 S. W. 1106, 1109; State ex inf. v. Williams, 222 Mo. 268, 121 S. W. 64, 17 Ann. Cas. 1006.

"In 22 R. C. L. at page 552, we find this language:

"It has been ruled that the resignation or the removal of an officer during his term and the election or appointment of a successor does not divide the term nor create a new and distinct one; and that in such a case the successor is filling out his predecessor's term."

* * * * *

"In Storke v. Goux, 129 Cal. 526, 62 P. 68, the Supreme Court of California decided that limitations which by their terms prevent a change of compensation during the term of office of an incumbent are effective as to one appointed to fill a vacancy. In the Storke Case the party elected to the office died, and between that time and the date of the appointment of plaintiff in that suit a law was passed increasing the salary accruing to the office. In holding the new officer was not entitled to the increase, the court had for consideration a constitutional provision similar to our statute here invoked."

CONCLUSION

In the premises, it is, therefore, the opinion of this office that the amendment to Section 14030, R. S.

Mr. Harry J. Naylor

-4-

January 17, 1945

Missouri, 1939, found in Laws of Missouri, 1943, page 324, is inoperative to increase the compensation of the incumbents of the respective offices of county assessor and persons appointed to fill out their unexpired terms, and that the compensation of such county assessors and their successors for the term ending June 1, 1945, is fixed by the provisions of Section 14030, as found in Revised Statutes of Missouri, 1939, without regard to such subsequent amendment.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

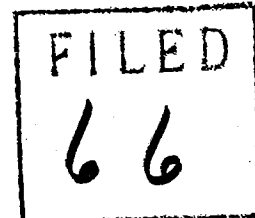
HARRY H. KAY
(Acting) Attorney General

WFB:HR

APPROPRIATIONS: Constitutionality of appropriation for payment of premiums in connection with agriculture exhibits.

July 2, 1945

7/11



Honorable Fred A. Neel
Representative, Randolph County
House Post Office
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter dated June 28, 1945, requesting an official opinion of this office, and reading as follows:

"I am asking for your opinion at the earliest date on House Bill #428, Page 42, Section 57a. Do the legislators have the right to appropriate money to the breeders of cattle, hogs and sheep to put on sales for their special benefit?"

That portion of House Bill No. 428 referred to in your letter reads as follows:

"Section 57a. There is hereby appropriated to the State Department of Agriculture according to Article 18, Chapter 102, Revised Statutes of Missouri, 1939, to be awarded as premiums made in connection with agriculture exhibits by members of boys' and girls' 4-H Clubs, vocational agriculture students, and Future Farmers of America, of Missouri, and State Breed Shows and Sales of beef cattle, dairy cattle, hogs, sheep, and poultry for encouraging the immediate production, distribution, and use of superior breeding stock

July 2, 1945

for the period beginning July 1, 1945,
and ending June 30, 1946, the sum of
\$15,000.00."

Section 14288 of Article 18, Chapter 102, R. S. Mo. 1939,
referred to in the appropriation bill, reads, in part, as fol-
lows:

" * * * The commissioner of agriculture
* * * may pay cash premiums from appro-
priations made in connection with agri-
culture exhibits, whenever in his judg-
ment same is desirable. * * *"

You will note that the appropriation bill makes provision
for the payment of premiums in connection with state breed
shows and sales of beef cattle, dairy cattle, hogs, sheep, and
poultry, whereas Section 14288, R. S. Mo. 1939, authorizes the
commissioner to pay cash premiums in connection with agricul-
ture exhibits. It might be thought that the appropriation bill
is more comprehensive in scope than the statute mentioned.
However, we find the following definition of "agriculture" or
"agricultural" in 3 Words and Phrases, Perm. Ed., page 36:

"The word 'agricultural' means pertaining
to, connected with, or engaged in 'agri-
culture,' which is the science of cultivat-
ing the ground, especially in fields or
large quantities, including the preparation
of the soil for the planting of the seeds,
the raising and harvesting of crops, and
the rearing, feeding and management of live-
stock; tillage, husbandry, and farming."

With this definition in mind, it is apparent that the
purposes for which the appropriation is made are within the
scope of Section 14288, R. S. Mo. 1939.

It then becomes pertinent to make some examination of the
statute purportedly authorizing the disposition of the money so
appropriated in the manner set out in said statute to determine
whether or not such purposes are in contravention of any con-
stitutional prohibitions.

The Constitution of 1945 contains the following provision appearing as Article III, Section 38, reading, in part, as follows:

"The general assembly shall have no power to grant public money or property, * * * to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. * * * "

It might be thought that the paying of premiums for the purposes mentioned in the appropriation bill would be in contravention of this constitutional provision. There has as yet been no case decided under this portion of the Constitution of 1945, nor has there been any judicial construction thereof. However, the Constitution of 1875 contained a similar provision, appearing as Article IV, Section 46, which read as follows:

"The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

A great many cases have been decided by the appellate courts construing this portion of the Constitution of 1875, particularly with reference to conditions under which public money may be appropriated and to whom. Probably the leading case under this provision of the Constitution of 1875 is Jasper County Farm Bureau v. Jasper County, 315 Mo. 560. In this

July 2, 1945

case a statute providing that county courts might appropriate public funds to the use of farm bureaus was under attack on the ground that it was unconstitutional in the light of Article IV, Section 46. In that case the court said:

"There is, of course, no difficulty in ruling that public funds cannot be appropriated for other than public purposes. About this there can be no dispute, and therefore, when a controversy such as comes up in this case arises, the only question to be considered is whether the purpose for which the money is to be appropriated is a public one within the meaning of the constitutional provisions.

"It is also true that many objects for which money may be appropriated are so clearly public in their nature that there could not well be any difference of opinion on the subject, such, for example, as public charities, and appropriations providing for the care of the indigent, destitute and insane, either in institutions exclusively under state control or those maintained by corporations for purely charitable purposes. * * * So also public funds appropriated for the state and county system of schools. Likewise the expending of public funds in the construction of necessary public buildings and the construction and maintenance of public roads. On the other hand, there are many other enterprises helpful to the public in the community in which they are located, and that contribute very largely to the development and progress of the State, that are so purely private in their nature as not to admit of any doubt about the matter. Such, for example, are manufacturing or commercial enterprises established and maintained by private individuals or corporations for purely private gain.

"There are also many purposes for which public money may be appropriated from the use

July 2, 1945

of which some persons derive more benefit than others, but this circumstance does not detract from the fact that their chief function is to administer to the public good, although the enjoyment and advantages derived from their maintenance are not distributed equally, even between members of the public who are situated alike or in the same class. If it were essential to the establishment or existence of an enterprise to be set up and sustained by public aid that all members of the public or all members of any class should derive from it the same or like benefits or advantages, then it would be entirely impossible to describe a public enterprise in aid of which public funds might be set apart.

" * * * It is not, however, necessary that the whole body of the contributing public shall be directly benefited or receive the advantages accruing from the establishment of the object in aid of what public funds may be set apart. It will be sufficient if it should be of such a character as that it promotes the general welfare and prosperity of the people who are taxed to sustain it.

* * * * *

"Measured by the standards outlined above, we have no doubt that public funds may be set apart to develop and promote the general agricultural interests of the State by the creation of farm bureaus, for it is a matter of common knowledge that in the agricultural interests of the State lie its chief source of wealth, and that the prosperity of the State springing from this source contributes to the growth and importance of every other industry in the State, as well as to the comfort and happiness of the whole people; and it is in recognition of this indispensable and thoroughly known

July 2, 1945

fact that appropriations made to foster, encourage and stimulate the agricultural interest of the State have always been regarded as made for a public purpose."

Applying the same reasoning to the purposes for which the money appropriated in the bill under consideration is to be used, we believe the statute under which disbursements are to be made to be constitutional. We further believe that inasmuch as the payment of the premiums is for the purpose of encouraging the immediate production, distribution and use of superior breeding stock, that such appropriation merely follows the past trend of legislative recognition of the importance of the agricultural industry of the State of Missouri and its contribution to the welfare of all of the citizens of the State.

CONCLUSION

In the premises, we are of the opinion that the appropriation for the payment of cash premiums as provided by Section 14288, R. S. Mo. 1939, as found in Section 57a of House Bill No. 428, is not in contravention of any constitutional prohibition against granting public money for the aid of individuals.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

LIQUOR CONTROL ACT:

Liquor licensee not required to be a voter and taxpayer of the county, town, city or village wherein he seeks the license, but he must be a resident of the State of Missouri.

January 29, 1945



2/20

Honorable Wayne Norman
Prosecuting Attorney
Putnam County
Unionville, Missouri

Dear Sir:

This will acknowledge your letter of January 23, and request for an opinion, which is as follows:

"I will appreciate your opinion on the following facts:

"A party holds a license to sell liquor by the package and is a resident and taxpayer and legal voter of this county. He contemplates moving into an adjoining county but intends to maintain this county as his voting residence. Does he, by moving from the county, disqualify himself under Section 4906 of the Liquor Laws from being granted a liquor license?"

Section 4906, Revised Statutes of Missouri 1939, reads as follows:

"No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village; and no person shall be granted a license or permit hereunder whose

license as such dealer has been revoked, or who has been convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, or who employs in his business as such dealer, any person whose license has been revoked or who has been convicted of violating such law since the date aforesaid; Provided, that nothing in this section contained shall prevent the issuance of licenses to nonresidents of Missouri or foreign corporations for the privilege of selling to duly licensed wholesalers and soliciting orders for the sale of intoxicating liquors, to, by or through a duly licensed wholesaler, within this state."

Judge Ellison construes Section 4906 in State ex rel. Klein v. Hughes, et al, 173 S.W. (2d) 877, l.c. 880, 881;

" * * * * that the retail licensee cannot be a nonresident, but must be a voter and taxpayer of some county, town, city or village in the state where he resides.

" * * * * We have the conviction that the statute does not and cannot still mean the licensee must be a voter and taxpayer of the county, town, city or village wherein he seeks the license, when that last adverbial clause was stricken from it eight years ago and another provision added which by clear implication permits him to have more than one license at the same time at different places in the state. * * * * "

Conclusion.

It is the opinion of this department that, under the provisions of Section 4906, Revised Statutes of

Honorable Wayne Norman

-3-

January 29, 1945

Missouri 1939, a licensee, under the Liquor Control Act of the State of Missouri, must be a resident of the State of Missouri, but the licensee is not required to be a resident of the county, town, city or village to obtain a state liquor license.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

AVO:ml

ROADS: Special tax levied for cutting weeds and brush growing in road cannot be expended for any other purpose and must be levied in accordance with statute.

April 26, 1945

FILED

67

4-27

Honorable Wayne Norman
Prosecuting Attorney
Unionville, Missouri

Dear Mr. Norman:

The Attorney General acknowledges receipt of your letter dated April 21, 1945, in which you make the following request for an opinion:

"Under section 8820 of the Missouri Revised Statutes, 1939, it appears that a township may levy up to 20% on the \$100 for the purpose of cutting and removing weeds and brush from country roads. Under subsection C of this section would you say that all lands adjoining a public road could be taxed to the full amount or if a part of said land were more than $\frac{1}{2}$ mile from the public road be subject to only 10% per \$100? In other words if three 40 acre tracts of land, owned by one man, one 40 adjoining the public road and the other two were back of it, could the 3rd 40 be taxed the same as the one adjoining the road although it was more than $\frac{1}{2}$ mile from the road? You will notice that this section starts off by specifying 'all lands' and ends up by using the words 'tracts of land', could land adjoining a state maintained road be taxed and the money used on roads elsewhere in the township?

"In your opinion could the road overseer only remove brush and weeds growing only between fences of the road or would he be allowed to go a reasonable distance beyond the fence to remove brush and weeds which damage the road?"

April 26, 1945

For convenience and to illustrate our conclusion, the portions of Section 8820, R. S. Mo. 1939, most pertinent to answering your questions, are herein set out.

Paragraph "(a)" places upon the road overseer the duty of cutting weeds and brush along the roads. The portion of this is as follows:

"It shall be the duty of the road overseer to keep the roads in his district in as good repair as the funds at his command will permit, to have all brush and weeds found growing along the road-side of the public highway cut and removed during the month of August of each year, * * *"

Paragraph "(c)" authorizes the levying of a benefit tax to pay the cost of the brush and weed cutting, and provides as follows:

"(c) For the purpose of carrying out the provisions of this section there is hereby levied in addition to all other road tax upon all real estate not incorporated within the limits of any city, town or village a special benefit tax of twenty cents per hundred dollars valuation on all land abutting upon or lying within one-half mile of any public road, and ten cents per hundred dollars valuation on all land lying more than one-half mile and up to one mile of any public road, and five cents per hundred dollars valuation on all land lying more than one mile and up to one and one-half mile from any public road, which tax benefits shall be spread upon the road overseer's books by the clerk of the township board, giving the name of the owner of each tract as it appears upon the assessor's book, the description of the land and the benefits charged set opposite each tract, which benefit tax books with blank receipt books shall be delivered to the road overseers of their respective districts on or

before the 15th day of May of each year, which books may also contain the names of those subject to poll tax. The said overseers, before entering upon their duties, shall give a good and sufficient bond payable to the township trustees in a sum equal to the amount of benefits charged against the land in their districts: Provided, that no tract of land lying within the radius of a public road as prescribed in this section shall be taxed in excess of twenty cents on the one hundred dollars valuation for any one year."

Paragraph "(e)" prescribes the procedure of the township board and authorizes it to reduce the levy for this purpose if the full amount is not considered to be necessary, and paragraph "(g)" prohibits the use of the funds derived from this benefit tax for any other purpose. Paragraph "(g)" is as follows:

"(g) Benefit levied must be used for the purpose levied. Poll tax may be used for any road purpose whatever."

In connection with these quotations from the statute, attention is directed to a few of the fundamental rules of statutory construction. The first of these rules is taken from Section 655, R. S. Mo. 1939:

"* * * First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * *"

And the following rules are cited from cases applying them:

The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent, which should be done from the words if possible, considering the language honestly and faithfully to ascertain its

plain and rational meaning and promote its object and manifest purpose.

City of St. Louis v. Pope, 126 S. W. (2d) 1201, 344 Mo. 479; Artophone Corporation v. Coale, 133 S. W. (2d) 343, 345 Mo. 344; City of St. Louis v. Braudis Coal Co., 137 S. W. (2d) 668.

Every word of the statute must be given some meaning if possible.

State ex rel. Kansas City Light and Power Co., v. Smith, 111 S. W. (2d) 513, 342 Mo. 75; Graves v. Little Tarkio Drainage District, 134 S. W. (2d) 70, 345 Mo. 557.

Bearing these rules in mind, attention is now directed to the statute. Paragraph "(a)" requires the road overseer to cut the weeds and brush "growing along the roadside of the public highway." It is a matter of common knowledge that the whole width of land dedicated to public use is not traveled over and that the untraveled portion of the roads do grow up in weeds and brush, and to eliminate these weeds and brush is the reason for the levy of this tax. However, this direction to cut the weeds and brush growing along the roadside does not convey any authority to the road overseer to invade private property and interfere with the landowner's use of his land.

From reading the entire statute, it seems obvious that the intention of the Legislature was to make provision for the remedying of this condition of weeds and brush growing in the roads and this provision provides funds for that purpose (paragraph "(c)", supra) by charging the costs to the lands benefited in accordance to the benefits which accrue from the lands. Under the provision of paragraph "(c)", supra, a benefit tax of twenty cents per hundred dollars valuation is authorized against all lands abutting on the highway or lying within one-half mile of any public road, ten cents per hundred dollars valuation on all lands lying more than one-half mile and up to one mile of any public road, and five cents per hundred dollars valuation on all land lying more than one mile and up to a mile and a half from any public road. By the use of the words, "or lying within one

April 26, 1945

half mile of any public road" in the first clause, the Legislature limited and defined the meaning of the word "abutting" so that under the provisions of this section the word "abutting" means lands lying within one-half mile of a public road.

To illustrate the application of this section - if a man owned a tract of land composed of three quarter-section tracts, one of which abutted on a public road, the other two extending back from the road, a tax of twenty cents per hundred dollars valuation could be levied upon the 160 acres adjoining the road, the 160 acres immediately back of it could be taxed at ten cents per hundred dollars valuation, and the third or back 160 acres, at five cents per hundred dollars valuation. And if he should then own another quarter section back of this, it could not have this tax levied on it.

The statute makes no distinction between roads which are state maintained and those which are locally maintained, for the purpose of this tax, and does not require the money raised by the tax to be spent along the land upon which the tax is paid.

Conclusion

From the foregoing, it is the opinion of this office that the answers to your questions are as follows:

(1) The third 40-acre tract could not be taxed at the same rate as the one lying along the road, for a square 40 acres is a quarter of a mile on each side, and the third 40 would be more than a half mile from the road;

(2) The money raised by this tax may be used for the purpose of cutting the brush and weeds in and along the road but cannot be expended for cutting brush and weeds growing on private property; and may be spent on any township road.

(3) The road overseer is not given any authority by this statute to invade private property to cut weeds and brush which might be damaging the road.

Respectfully submitted,

APPROVED:

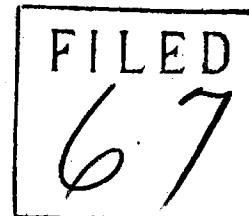
W. O. JACKSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

WOJ:EG

TAXATION: County courts must follow existing statutes until amended to conform to new Constitution.

May 2, 1945



Honorable Robert V. Niedner
Prosecuting Attorney
St. Charles, Missouri

Dear Mr. Niedner:

Under date of April 26, 1945, you wrote this office requesting an opinion about the authority of the County Court of St. Charles County to levy taxes in the year 1945 in conformity with the provisions of Sections 11 and 12, Article X of the Constitution of 1945.

In your letter you state that St. Charles County has an assessed valuation of \$30,000,000 and more.

Section 8527, R. S. Mo. 1939, authorizes a levy of not exceeding twenty-five cents on the hundred dollars valuation for road and bridge purposes. Section 12, Article X of the Constitution of 1945, authorizes a levy for these purposes of not to exceed thirty-five cents on the hundred dollars valuation. There is a definite conflict between the statute and the Constitution.

The same conflicting situation exists between the provisions of Section 11046, R. S. Mo. 1939, as amended by Laws of Missouri, 1943, page 1158, which authorizes a levy of not to exceed thirty-five cents on the hundred dollars valuation in counties having an assessed valuation of \$30,000,000 or more, and Section 11, Article X of the Constitution, which authorizes a levy of fifty cents on the hundred dollars valuation in all counties having an assessed valuation of \$50,000,000.

Section 2 of the Schedule of the Constitution of 1945 is as follows:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full

May 2, 1945

force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

This section keeps the statutes in force until July 1, 1946, unless sooner amended or repealed.

Conclusion

It is, therefore, the conclusion of this department that the county court in levying taxes in the year 1945, must follow the provisions of the statutes unless they are amended before the court makes the levy.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

WOJ:EG

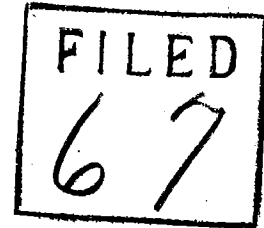
APPROVED:

J. E. TAYLOR
Attorney General

(Withdraws Opinion No. 67 to Wayne Norman, dated March 9, 1945)

SPECIAL ROAD DISTRICTS: Township boards are required to comply
TOWNSHIP BOARDS: with Sec. 8821, R. S. Mo. 1939, in
fixing maximum levy for road and bridge
tax for 1945.

May 16, 1945



Honorable Wayne Norman
Prosecuting Attorney
Putnam County
Unionville, Missouri

Dear Sir:

Under date of March 9, 1945, this office rendered you
an opinion upon the following questions:

"What is the rate of tax that a board
of commissioners of a special road dis-
trict situate in a county under township
organization may levy for road purposes,
without calling a special election?"

"What is the rate of tax that a board of
commissioners of a special road district,
situate in a county under township organi-
zation may levy for road purposes with a
special election called by the county
court for the purpose of voting on a spe-
cial tax?"

Since that time, we have had occasion to write numerous
opinions upon questions as to what tax levies should be used
in the current year of 1945, copies of two of said opinions
being enclosed herewith. We have discovered that a part of
our opinion of March 9, 1945, above referred to, is erroneous,
and we are, therefore, withdrawing and cancelling said opin-
ion, and the following will be our opinion upon your questions.

Section 12 of Article X of the new Constitution reads
as follows:

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law.

"Nothing in this section shall prevent the refund of taxes collected hereunder to cities and towns for road and bridge purposes."

Under said Section 12, it will be seen that the township board of directors, in counties under township organization, is authorized to levy a tax up to thirty-five cents on each one hundred dollars valuation for road and bridge purposes. However, Section 8821, R. S. Mo. 1939, provides as follows:

"The township board of directors of any township may, annually, in their discretion, at the same time and in the same manner as taxes are now required by law to be levied for county purposes, levy an annual tax in

May 16, 1945

addition to those now authorized by law, in any amount not exceeding twenty-five cents on each one hundred dollars valuation on all property subject to taxation in such township, to be known as a special road and bridge fund: * * * "

It will be seen, therefore, that Section 8821, supra, is in conflict with the provisions of Section 12 of Article X of the new Constitution. In that situation, attention is directed to Section 2 of the Schedule to the new Constitution, which reads as follows:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Under Section 2 of the Schedule, above quoted, Section 8821 of the Statutes will continue in force and effect until July 1, 1946, unless sooner amended or repealed. Therefore, the township board of directors can only levy a tax up to twenty-five cents for a special road and bridge fund, and this limitation applies to the tax levy for the year 1945.

Section 12, supra, of the new Constitution also provides that, in addition to the levy for road and bridge purposes mentioned in the first part of said section, the county court shall, when authorized by a majority of the qualified voters of a special road district voting on such proposition, make an additional levy of not to exceed thirty-five cents on the one hundred dollars valuation on all taxable property within such special road district. Said election is required to be called and held in the manner provided by law. The provision with respect to the additional tax is, therefore, dependent upon legislation to supplement it in order that it can be carried into effect. At the present time, no legislation has been passed providing the manner of calling and holding such

May 16, 1945

an election. Consequently, there is no way by which said additional levy can now be made. If and when provision is made by the Legislature for calling and holding an election in special road districts for the purpose of voting upon such special levy, said additional levy can be made by the county court.

CONCLUSION

It is, therefore, the opinion of this office that the township board of directors in counties under township organization may levy for the year 1945, for a special road and bridge fund, a tax of not to exceed twenty-five cents on the one hundred dollars valuation, under the provisions of Section 8821, R. S. Mo. 1939, and that if and when legislation is passed authorizing the calling and holding of an election in special road districts to vote upon an additional levy, the county court of such county, when authorized by a majority of the qualified voters of a special road district, may make an additional levy of not to exceed thirty-five cents on the one hundred dollars valuation on all property within said special road district, which said tax shall be credited to the road district authorizing the levy.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HHK:HR

FILED

67

August 24, 1945

9/25

Honorable Robert V. Niedner
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, which reads:

"The County Court of St. Charles County has made an order requesting my office to seek an opinion from you concerning whether women can serve upon either petit or grand juries at the present time, i.e.: before enabling legislation is passed or July 1, 1946, whichever comes first. Would you please give me an opinion for the Court on this question.

"I believe that one of the reasons for the Court's being in doubt about this question is the statement made in paragraph numbered (1) at l.c. 48 in the case of State vs. Cole, 188 S.W. 2d 43, decided by the Supreme Court on June 11, 1945. The County Court wants to know whether in view of the constitutional provision with reference to women jurors, the Schedule of the Constitution, and the above indicated paragraph of State vs. Cole, they should include the names of women among those names taken from the tax books from which jury panels are drawn at the present time."

August 24, 1945

Your attention is called to Section 697, R.S. Mo. 1939, which reads as follows:

"Every juror, grand and petit, shall be a male citizen of the state, resident of the county, sober and intelligent of good reputation, over twenty-one years of age and otherwise qualified."

The 1945 Constitution of Missouri, page 17, provides that no person shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror.

This Constitution further provides, page 63:

" * * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Conclusion.

It is the opinion of this department that women are not eligible for jury service until such a time as the Legislature shall pass an enabling Act, or until July 1, 1946.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

WBD:ml

RECORDERS:

IN RE:

The appointment of additional help in the office of the Recorder of Deeds to record military service discharges.

November 20, 1945

FILED

67

Mr. Robert V. Niedner
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Mr. Niedner:

This will acknowledge receipt of your letter of October 26, 1945, requesting an opinion of this office regarding the employment of a clerk in the office of the Recorder of Deeds to aid in the recording of military service discharges and in the preparation of certified copies of discharge certificates. Your letter of October 26, 1945, reads as follows:

"Will you please send me your opinion in answer to the following question:

"May the County Court appropriate funds from its General Revenue for the purpose of employing a Clerk in the Office of the Recorder of Deeds to record discharge certificates of persons in military service and to prepare certified copies of such certificates?"

Section 13160, R. S. Mo. 1939, reads as follows:

"In all counties wherein the offices of clerk of the circuit court and recorder of deeds have been or may be separated, the recorder of deeds may appoint in writing one or more deputies, to be approved by the county court of their respective counties, which appointment, with the like oath of office as their principals, to be taken by them and indorsed thereon, shall be filed in the office of the county clerk. Such deputy recorders shall possess the qualifications of clerks of courts of record, and may, in the name of their principals, perform the duties of

November 20, 1945

recorder of deeds, but all recorders of deeds and their sureties shall be responsible for the official conduct of their deputies. But no recorder now holding office shall appoint such deputy or deputies until he shall have entered into a new bond to the state in such sum, manner and form as is now required by law. R. S. 1929, Sec. 11542."

The above quoted section provides for the appointment of deputy recorders. While your letter uses the word "Clerk" in referring to the additional help in the Office of the Recorder of Deeds, we assume that you had in mind the same meaning as is referred to in the statute, the only difference being that you used the word "Clerk" while the statute uses the word "deputy". This must of course, follow because there is no statutory provision for the employment of extra help in the office of Recorder of Deeds which refers to such help as a "Clerk". The only provision for extra help is in the above section authorizing deputies.

We think the question upon which the matter before us turns is whether or not the Recorder of Deeds of St. Charles County falls within the provisions of Section 13160, supra.

Section 13147, R. S. Mo. 1939, provides as follows:

"There shall be an office of recorder in each county in the state containing 19,000 inhabitants or more, to be styled 'The office of the Recorder of Deeds.' R. S. 1929, Sec. 11526. Reenacted Laws 1933, p. 360, As amended, Laws 1941, p. 524, Sec. 1."

Section 13149, R. S. Mo. 1939, provides as follows:

"The clerks of the circuit courts shall be ex officio recorders in their respective counties, except in counties containing 19,000 inhabitants or more. R. S. 1929, Sec. 11528. Reenacted, Laws 1933, p. 360. As amended, Laws 1941, p. 524, Sec. 1."

The above sections have been construed by the Missouri Supreme Court in State ex inf. Crain v. Moore, 99 S. W.(2d) 17, 339 Mo. 492, The court, at l.c. 497 and 504, said:

"* * *For more than 100 years our statutes

provided generally that circuit clerks should be ex officio recorders. (R. S. 1825, p. 655; Sec. 11528, R. S. 1929.) And from 1865 on there was a further provision that in every county having a population of ten thousand inhabitants, it should be lawful for the county court to make an order separating the two offices. (G. S. 1865, sec. 23, p. 161; Sec. 11533, R. S. 1929.) The Act of 1933 struck out this Section 11533, and reenacted Sections 11526 and 11528 making the circuit clerk ex officio recorder in counties containing less than 20,000 inhabitants and separating the two offices in counties of greater population.* * *

* * * * *

"* * * Section 11526 thereof provides there shall be a separate office of recorder of deeds in each county in the State 'containing 20,000 inhabitants or more.' Section 11528 says the clerks of circuit courts shall be ex officio recorders in their respective counties 'except in counties containing 20,000 inhabitants or more.' The two sections obviously refer to counties which from time to time contain the specified populations.* * *

The holding in this case, that the offices of Clerk of the Circuit Court and Recorder of Deeds in Counties containing a population of more than 19,000 inhabitants (the figures 19,000 were substituted for the figures 20,000 by an amendment, Laws 1941, page 524, Sec. 1) are separate offices, was reaffirmed in State ex inf. Lamkin ex rel. Harrison v. Tennyson, 151 S. W. (2d) 1090, 347 Mo. 1024. By the population census of 1940, the County of St. Charles contained 25, 562 inhabitants. Therefore, under sections 13147 and 13149, supra, the office of Recorder of Deeds in St. Charles County was made a separate office by the Act of 1933, which contained the sections just referred to.

Section 13158, R. S. Mo. 1939, provides, in part, as follows:

"In any county now or hereafter having a population of 20,000 and less than two hundred thousand inhabitants, the question

of combining the offices of circuit clerk and recorder may be submitted or resubmitted, to the qualified voters at the general election to be held in the year 1936, or any four or multiple of four years thereafter.* * *

Unless the people of St. Charles County have voted to combine the offices of Circuit Clerk and Recorder of Deeds, under Section 13158, supra, they remain separate offices. In your letter of November 14, 1945, you informed us that the office of Recorder of Deeds of said county constituted a separate office. It is patent, therefore, that no action has been taken to combine the offices of Circuit Clerk and Recorder of Deeds under Section 13158, supra, and, thus, they remain separate offices, under Sections 13147 and 13149, supra.

The determination left to be made is whether Section 13160, supra, applies to counties where the office of Recorder of Deeds is now a separate office. In order to do this we must ascertain whether the words "have been or may be separated," contained in Section 13160, supra, refer and apply to counties which now have a separate office of Recorder of Deeds.

What is now Section 13147, supra, was originally enacted in 1804, and, prior to 1933, read as follows:

"* * *There shall be an office of recorder in each county in the state, to be styled 'The office of the recorder of deeds'."

What is now Section 13158, R. S. Mo. was originally enacted in 1879, and, prior to 1933, read as follows:

"* * *In all counties wherein the assessed valuation of all property shall exceed fifteen millions of dollars and in which the offices of county clerk and recorder of deeds are joined, it shall be the duty of the county court, within thirty days after this chapter takes effect, to make an order separating said offices."

What is now Section 13160, supra, was originally enacted in 1883. It has remained as enacted up to the present time. However, the original section in 1883 contained an additional paragraph, which followed the words of the present section 13160, supra. This paragraph read as follows:

"Section 2. There being no provision in the statutes whereby recorders of deeds can appoint deputies in counties wherein said office is separate from clerk of the circuit court, creates an emergency within the meaning of the constitution; therefore, this act shall take effect and be in force from and after its passage."

It will be noticed from the historical facts, just set out, that what is now Section 13160, supra, was, at the time of its passage intended to apply to counties where the two offices were separate. By former enactments the County Court had been given the right to separate the two offices where a county contained a certain population. In these counties this had undoubtedly been done. Under the provisions of what is now Section 13158, supra, the separation of the offices was made on the basis of population and, as the population was steadily growing the Legislature knew that other counties would fall under the provisions of Section 13160, supra, and the two offices would be separated. It is thus clear why the Legislature used the words "have been or may be separated." Their intent was to take care of the situation which would arise when the two offices became separate offices in any county. They could not, however, have meant to exclude from the provisions of what is now Section 13160, supra, the counties in which the office of Recorder of Deeds was then separate, since such separation had already been accomplished by former acts. If any further authority on this proposition is needed, we have it expressly provided in the second paragraph of the Act passed in 1883. This paragraph shows clearly that the Legislature intended the section to apply in counties where the office of Recorder of Deeds was a separate office, since it stated that the Act was to go into effect as an emergency measure because there was, at that time, no provision for deputy recorders in counties where the office was a separate office.

It must be assumed that the Legislature knew the meaning and application of Section 13160, supra, when they reenacted it in 1933. Knowing that it applied to counties where the two offices were separate there was no need of changing its wording. We think the historical origin and background of Section 13160, supra, indicates clearly the interpretation which should be placed upon Section 13160, supra.

However, that it applies to counties where the office of Recorder of Deeds is separate, is, we think also apparent from an examination of other sections of the same Act of 1933. Statutes in pari materia must be construed together and the intent of the Legislature in passing a section must be determined by a consideration

of other sections on the same subject. Hull v. Baumann, 131 S. W. (2d) 721, 345 Mo. 159; State ex rel. Karbe v. Bader, 78 S. W. (2d) 835, 336 Mo. 259; State ex rel. Buchanan County v. Fulks, 247 S. W. 129, 296 Mo. 614. Sections 13154, 13155 and 13159 R. S. Mo., all passed along with Section 13160, supra, in 1933, refer to situations occurring when the offices of Circuit Clerk and Recorder of Deeds are separate offices.

Section 13154, R. S. Mo. 1939, reads as follows:

"That in the event any person has been elected or may hereafter be elected to the office of recorder of deeds in a county in which the office is a separate office at the time of such election, such office shall remain a separate office for the entire term for which such person has been or may be elected. R. S. 1929, Section 11534. Reenacted, Laws 1933, p. 360."

Section 13155, R. S. Mo. 1939, reads as follows:

"On the first Tuesday after the first Monday in November, 1934, and every four years thereafter, an election shall be held for said office of recorder, in each county of the state where the office of clerk of the circuit court and recorder of deeds are separate and the person so chosen at said election shall, on the first day of January next following, enter upon the duties of his office, first giving bond in the sum of not less than one thousand dollars (\$1000) or more than five thousand dollars (\$5000), at the discretion of the county court, conditioned for the faithful performance of the duties of his office, with at least two sufficient sureties, to be approved by the county court. R. S. 1929, Sec. 11535. Re-enacted Laws 1933, p. 360."

Section 13159, R. S. Mo. 1939, reads as follows:

"At the general election to be held in the State of Missouri in 1934 and every four years thereafter, in all counties where the office of Circuit Clerk and Recorder are separate, a recorder of deeds shall be elected

R.S. 1929, Sec. 11541. Reenacted, Laws 1933.
p. 360."

We think it clear that the Legislature had in mind the situation existing where the two offices were separate offices when they passed the Act of 1933. A large portion of the Act deals with the conditions where the office of Recorder of Deeds and Circuit Clerk are separate. In other words, they passed sections which apply expressly to where the offices were separate, but did not feel that there was any need for a change in the wording of Section 13180, *supra*, since it had formerly applied where the office of Recorder of Deeds was a separate office.

Section 13187, R.S. Mo. 1939, reads as follows:

"The recorder of each county in which the offices of recorder of deeds and clerk of the circuit court are separate shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all the fees received by him, over and above the sum of four thousand dollars, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury, to form a part of the jury fund of the county."

In State ex rel. Vernon County vs. King (1896), 136 Mo. 309, the Supreme Court of Missouri passed upon the question of whether a Recorder of Deeds was required to remit certain fees which he had collected over and above the four thousand dollars which he was entitled to keep as his compensation. The Recorder contended that he had paid the excess amount out for deputy hire. The question was whether or not the County Court could refuse to allow this amount for deputy hire. The Court held that the Recorder was not required to pay any money into the County treasury, and affirmed the lower Court which had so held. The Court cited Section 7450, R.S. Mo. 1899, which was the same as our present Section 13187, and in holding that this section allowed the Recorder a reasonable amount for deputy hire at l.c. 318, 319, 320 and 321, said:

November 20, 1945

"Under these provisions, is a recorder entitled, as a matter of right, to retain out of the fees of his office an amount sufficient to pay reasonable compensation to necessary assistants, or is the allowance left entirely to the discretion of the county court?"

* * * * *

"In construing a statute which provided that when a county officer receiving a salary is compelled, by pressure of business to employ a deputy, 'the county court may make a reasonable allowance to the deputy,' the court held that the county must pay a reasonable compensation for the necessary service rendered, and that payment was not discretionary with the county court. Bradley v. Jefferson Co., 4 G. Greene, 300. See, also, Washington Co. v. Jones, 45 Iowa, 261.

"We are of the opinion, therefore, that the allowance to the recorder of reasonable compensation for necessary hire of assistants was not a matter of mere discretion with the county court. In his settlement, the recorder was entitled to a credit for the amount so paid; and, if such credit had been given, there would be, at most, but a small amount, if anything, due the county."

* * * * *

"But assuming that the settlement was fairly made, and that the payment of \$4,000 was on account thereof, and that a balance of \$1,519 remained unpaid, yet the amount was subject to the credit of whatever necessary sum was actually paid for the hire of clerks and other assistants. The agreement in respect to the allowance of such credit should be given as broad a meaning as that given to the statute; that is, that

November 20, 1945

defendant should have a credit for all amounts actually paid by him which were reasonable and necessary for the proper performance of the duties of the office."

The County Court must therefore, allow out of the fees which the County Recorder is required to turn into the Treasury, a reasonable amount for deputy hire.

CONCLUSION.

It is, therefore, the opinion of this department that Section 13160, R.S. Mo. 1939, now applies to counties where the office of Recorder of Deeds is a separate office, and that said section authorizes the Recorder of Deeds for St. Charles County to acquire additional help in the form of a deputy or deputies, which he is authorized to appoint with the approval of the County Court, to assist in the recording of military discharge certificates, and the preparation of certified copies of such certificates.

It is the further opinion of this department that the compensation of deputy recorders must be paid out of the fees which the Recorder receives for his services, and that the County Court must allow him out of such fees a reasonable amount for the payment of such deputies.

Respectfully submitted,

SMITH N. CROWE, Jr.
Assistant Attorney General

APPROVED:

(Acting) Attorney General

SNC:mw;ir

PHARMACY: Person engaged exclusively in wholesale drug business is required to be registered pharmacist, or have registered pharmacist in his employ when he compounds or dispenses drugs in connection with his business.

April 17, 1945



Mr. Alfred Page
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, under date of April 9th, 1945, which request reads as follows:

"This office has been somewhat confused in the interpretation of Section 10005 R. S. Mo. 1943, relating to druggist and pharmacist. The particular clause in question is as follows:

'Provided, however, that nothing in this section shall be construed to interfere with any legally registered practitioner of medicine or dentistry in the compounding or dispensing of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist.'

"The particular clause giving the trouble is the portion underscored.

"We have no trouble interpreting the quoted portion concerning the wholesaler who has in his employ a registered pharmacist. The

question is whether or not the section as a whole would be construed to prohibit a wholesaler from conducting his business as a wholesaler without being himself a pharmacist, or without having in his employ a registered pharmacist.

"It has appeared to us that a wholesaler is immune from prosecution even though he does not have in his employ a registered pharmacist, provided he does not sell at retail.

"We shall be glad to have your opinion because there is a wholesale druggist who is not a pharmacist operating in this city who does not have in his employ a registered pharmacist."

Section 10005, R. S. Mo. 1939, makes it unlawful to conduct a drugstore except under certain conditions. Section 10005 provides as follows:

"It shall be unlawful for any person not licensed as a pharmacist within the meaning of this chapter to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drugs, medicines, chemicals or poisons, or for the compounding of physicians' prescriptions, or to keep exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this chapter to compound, dispense or sell at retail any drug, chemical, poison or pharmaceutical preparation upon the prescription of a physician, or otherwise, or to compound physicians' prescriptions, except as an aid to or under the supervision of a person licensed as a pharmacist under this chapter. And it shall be unlawful for any owner or manager

of a pharmacy or drug store, or
other place of business, to cause
or permit any other than a person
licensed as a pharmacist to compound,
dispense or sell, at retail, any drug,
medicine or poison, except as an aid
to or under the supervision of a per-
son licensed as a pharmacist: Provided,
however, that nothing in this section
shall be construed to interfere with
any legally registered practitioner of
medicine or dentistry in the compound-
ing or dispensing of his own prescrip-
tions, nor with the exclusively whole-
sale business of any dealer who shall
be licensed as a pharmacist or who shall
keep in his employ at least one person
who is licensed as a pharmacist, * * *"

(Emphasis ours.)

Section 10022, R. S. Mo. 1939, provides for the penalties applicable to violations of Section 10005. Section 10022 provides as follows:

"Whoever, not being licensed as a pharmacist, shall conduct or manage any drug store, pharmacy or other place of business for the compounding, dispensing or sale at retail of any drugs, medicines or poisons, or for the compounding of physicians' prescriptions, contrary to the provisions of Section 10005 of this chapter, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars, and each week such drug store or pharmacy or other place of business is so unlawfully conducted shall be held to constitute a separate and distinct offense. Whoever, not being licensed as a pharmacist, shall compound, dispense or sell at retail any drug, medicine, poison or pharmaceutical preparation, either upon a physician's prescription or otherwise, and whoever

being the owner or manager of a drug store, pharmacy or other place of business shall cause or permit any one not licensed as a pharmacist to dispense, sell at retail, or compound any drug, medicine, poison or physician's prescription, contrary to the provisions of Section 10005 of this chapter, shall be deemed guilty of misdemeanor, and upon conviction thereof, shall be fined not less than ten dollars nor more than one hundred dollars. * * * * *

(Emphasis ours.)

The word "retail" involves the opening of the ultimate original package and the dividing of its contents in connection with the ordinary dispensing or compounding of medicines, and the word "retail" need not be interpreted in connection with the words "compounding or dispensing" on the principle of noscitur a sociis. The three words have three separate meanings; at least, the word "retail" differs radically in meaning from the other two words of the collocation, and has additional meaning. "Retail" is differentiated from "wholesale," as it was held in *Veazey Drug Co. v. Bruza*, 37 Pac. (2d) 294, 169 Okla. 418, that "a 'wholesale dealer' is one whose business is the selling of goods in gross to retail dealers, and not by the small quantity or parcel to consumers thereof." On the other hand, dispensing and compounding requires the experience and skill of a registered pharmacist, or at least the dispensing and compounding should be under the supervision of a registered pharmacist. The general purpose of the Act which we are construing is to prevent the conduct of any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drugs, medicines, chemicals, or poisons, except by pharmacists or under the supervision of a person licensed as a pharmacist.

At common law the retailing of medicines was not a crime, and, so far as the State of Missouri is concerned, only Sections 10005 and 10022, R. S. 1939, that we are considering, make the action of retailing, compounding or dispensing of any drugs, medicines, chemicals or poisons by others than a registered pharmacist or under the supervision of a registered pharmacist, criminal in nature.

The general rule for the construction of penal statutes is that they should be construed strictly, and not extended by implication; where the statute is made for the public good, although it be penal, it should receive an equitable construction.

The New York City Consolidation Act of 1882 (Chap. 410, Sec. 2015) uses almost the same language as the statute in question, embodying the words "retailing, dispensing or compounding medicines or poisons." The case of *The People v. Rontey* (21 N. Y. St. Repr. 173) was an appeal from a conviction under that act, and the court (at page 177), in affirming the conviction, said:

"The statute was in the nature of a police regulation, aimed at greater safety to the people by requiring that drugs should be dispensed only by experienced persons, to whom alone that duty should be assigned, and who alone should be permitted to discharge it. The appellant, therefore, was not justified in openly disregarding the provisions of the statute, which required important and substantial forms to be observed before attempting to sell drugs and medicines. Public safety must be regarded as superior to any private rights, and his business must yield to the necessities recognized by proper legislation."

It makes little difference, under these decisions, whether the statutes be construed strictly or equitably, because, if the dealer is engaging exclusively in wholesale business and compounds or dispenses any drugs, medicines, chemicals or poisons without being himself a registered pharmacist or maintaining in his employ at least one person who is licensed as a pharmacist, he does so in violation of Sections 10005 and 10022, R. S. Mo. 1939, quoted above.

CONCLUSION

It is, therefore, the opinion of this Department that a dealer, who is not a registered pharmacist or does not

Mr. Alfred Page

(6)

April 17, 1945

have a registered pharmacist in his employ, who engages exclusively in the wholesale drug business, and, in connection with that business compounds or dispenses any drugs, medicines, chemicals or poisons, is guilty of a misdemeanor under the provisions of Sections 10005 and 10022, R. S. Mo. 1939.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

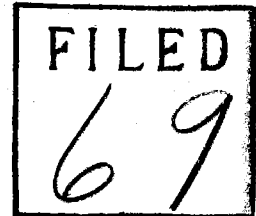
APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

ELEEMOSYNARY INS TUTIONS: County Court has no authority to deduct, from amounts due eleemosynary institution in year 1945, for overcharge made in previous year or years.

May 24, 1945



3/31

Honorable W. R. Painter
President, Board of Managers
State Eleemosynary Institutions
Capitol Building
Jefferson City, Missouri

Dear Governor Painter:

Under date of May 15, 1945, you wrote this office requesting an opinion as follows:

"I have received your letter concerning the price to be charged for merchandise furnished to patients.

"Up to December 31st, 1944, there had been no adjustment of this account. Some of the counties are trying to deduct from their payment to the Eleemosynary Board for 1945 accounts what they think would be a fair deduction for the overcharge in 1944. We take the position here that was a debt incurred in 1944 and they will have to send their claim to the State Auditor and await the payment of same by the legislature as we have no money with which to make payment. We maintain we should be paid in full for the 1945 charges, with no deduction being made for the 1944 adjustment.

"Please give us your opinion about this as it is causing some trouble."

The operation of the eleemosynary institutions is controlled by statute, so that the answer to your question depends to a great extent upon statutory law.

Section 9328, R. S. Mo. 1939, requires the county courts to pay on behalf of the counties a portion of the expense of the indigent patients sent by counties. This section is as follows:

"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding six dollars (\$6.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

Section 9334, R. S. Mo. 1939, requires the superintendents of the various institutions to cause statements of account to be sent to the county courts of the various counties having patients in the institutions, which section provides as follows:

"The superintendent shall, under the direction of the managers, cause, once in every six months, to be made out and forwarded to any county court which may send to a state hospital an insane poor

person, an exact account of the sum due and owing by such court on account of such insane person. Said court, at its first session thereafter, shall proceed to allow, and cause to be paid over to the treasurer of such state hospital, the amount of said account."

Section 9300, R. S. No. 1939, requires all money received by the institutions to be deposited in the State Treasury, providing as follows:

"All moneys received by any institution for the support of patients therein, from whatever source received, shall be paid into the state treasury, and shall be placed to the credit of the fund for the support of the eleemosynary institutions."

From these statutes it is apparent that the officers of the institutions have no discretion in the collection of the funds, merely acting as agents for the state, and that the money which is collected by the various institutions becomes a part of the state funds in the State Treasury.

The statutes also require the State Auditor to audit all accounts against the institutions. Section 9304, R. S. No. 1939. Further, the Board is authorized to bring suit to collect the accounts, Section 9306, R. S. No. 1939, providing for same as follows:

"For all debts and demands whatsoever due any eleemosynary institution, and all damages for failure of contract, and for trespass and other wrongs to the institution or any property thereof, real or personal, actions in any court of competent jurisdiction may be maintained in the name of the Board of managers of such institution, naming it. Interest shall be recovered on any and all sums due the institution from the time when the cause of action accrued. In actions for any indebtedness, or for any damages due the institution on

May 24, 1945

account of any patient or inmate thereof, the account therefor, certified by the superintendent, with the seal of the institution attached, shall be prima facie evidence of the amount due."

No statute has been found conferring authority on the officers of the institutions or the Board of Managers to make refunds of amounts erroneously charged for clothing, nor do we find any appropriation or item of appropriation for such refund.

This would all seem to indicate that county courts which have paid an excessive amount for clothing, for which account had been erroneously submitted, would not be authorized to deduct from later accounts the amount of such overcharge. Relief should be obtained through the Legislature.

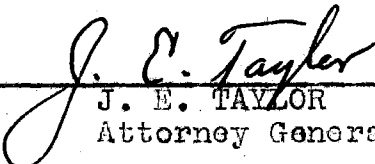
Conclusion

It is, therefore, the conclusion of this Department that a county court has no authority to attempt to deduct, from amounts due an eleemosynary institution in the year 1945, for an overcharge made in some previous year or years.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

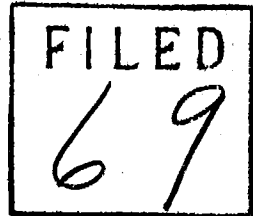
APPROVED:


J. E. TAYLOR
Attorney General

WOJ:EG

ELEEMOSYNARY INSTITUTIONS: Disposition of patients'
PATIENTS' FUNDS: funds in the custody of
PROBATE COURTS: stewards of State Hospitals.

July 31, 1945



Honorable W. R. Painter
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Governor Painter:

This will acknowledge receipt of your request for an official opinion, which reads:

"At our State Hospital #3, Nevada, we have in the patients' fund \$894.37 which has accumulated during the past twenty years due to inability to find any relative of patients who have died to whom refund could be made.

"What can we do with the money?"

Supplementing your written request, you recently informed us that most of the accounts in the patients' fund were small and it would hardly pay to have an administration of the estate of the deceased patients, for the reason that the cost would exceed the value of the estates.

You state you are unable to find any heirs of the deceased persons leaving funds in your custody, however you do not give us any indication as to what actual inquiry has been made to determine this fact. The presumption in law is that a decedent leaves heirs or next of kin capable of inheriting. Section 25, Volume 21, C. J., page 857, reads:

"The burden is on plaintiff to prove an escheat, and its right to the property under the statute defining those to whom escheated property is payable. The law presumes that a decedent leaves heirs or next of kin capable of inheriting, and it is incumbent upon the state to rebut this

July 31, 1945

presumption by proof of high degree. But when the state has shown prima facie the escheat of the property of an intestate for want of heirs, the burden is then on claimant to prove that he is in fact an heir. * * * *

Volume 30, C. J. S., Section 2, page 1165, lays down the general principle of law that the most important ground of escheat now recognized is death intestate without heirs, and such is a ground of escheat in all jurisdictions. Said section reads in part:

"Death intestate without heirs. The most important ground of escheat now recognized is death intestate without heirs, and this is a ground of escheat in all jurisdictions."

It is also well established that when a procedure relating to an escheat fund is regulated by statute, the escheat must be established in the manner prescribed by statute. (See Section 8, Volume 30, C. J. S., page 1175.) In Robinson et al. v. State et al., 87 S. W. (2d) 297, 1.c. 298, it was held:

" * * * Forfeitures not being favored by the law, it has been held that no escheat, nor the proceeding therefor, can be had except under and according to the legislative enactments, Hamilton v. Brown, 161 U. S. 256, 16 S. Ct. 585, 40 L. Ed. 691, and that the method provided must not be departed from in any essential particular, otherwise the judgment will be void. * * * "

At common law personal estates of an intestate leaving no next of kin belonged absolutely to the sovereign. In the case of In re Germaine, 280 N. Y. S., 460, 1.c. 464, the court said:

"At common law the personal estate of an intestate who left no next of kin belonged absolutely to the sovereign. Broom's Legal Maxims (6 Amer. Ed., from the 4th London Ed.) p. 59."

In the case of In re Harrisburg Bridge Co., 38 Pa. District and County Reports, 657, 1.c. 661, 662, it was held that under the doctrine of bona vacantia property that has ceased to have an owner should be held for the benefit of the community by the sovereignty.

Authorities differ as to the necessity for judicial proceedings to establish escheats. (See Section 19, sub-section 2, Volume 30, C. J. S., pages 1184, 1184.) In Robinson et al. v. State et al., supra, the court, in holding the only purpose for proceedings is to secure a judicial declaration that certain facts exist which, under the law, cast title on the state, said:

"The rule is, in our opinion, a wholesome one. If in truth the circumstances exist which escheat the property to the state, the title vests in the state by operation of law upon the death of the owner. Ellis v. State, 3 Tex. Civ. App. 170, 21 S. W. 66, 24 S. W. 660. And the only purpose of the proceedings provided by the statutes is to secure a judicial declaration that the facts exist which, under the law, cast title upon the state."

In the case of In re Ohlsen's Estate, 75 Pac. Rep. (2d) 6, 100, 7, the court approvingly quoted from 10 R. C. L. 616, Section 14, as follows:

"It is the general common law rule that upon the death of a person intestate and without heirs, or without heirs competent to take, the title by escheat vests in the state immediately. * * * *"

Section 620, Chapter 3, Article 1, R. S. 1939, provides that if any person die intestate, seized of any real or personal property, leaving no heirs or representatives capable of inheriting the same, such property shall escheat and vest in the state, subject in accordance with the provision of the chapter on escheat. In this section there are several conditions, besides the one hereinabove specifically mentioned, for property escheating to the state. However, the strange thing about it is that apparently the provision hereinabove mentioned is the only one that provides for an escheat to the state wherein there is no prior settlement or accounting of some nature or judicial determination of facts. Section 620 reads:

"If any person die intestate, seized of any real or personal property, leaving no heirs or representatives capable of inheriting the same; or, if upon final settlement of an executor or administrator, there is a balance in his hands belonging to some legatee or distributee who is a non-resident or who is not in a situation

July 31, 1945

to receive the same and give a discharge thereof or who does not appear by himself or agent to claim and receive the same; or, if upon final settlement of an assignee for the benefit of creditors, there shall remain in his possession any unclaimed dividends; or, if upon final report of any sheriff to the court, it is shown that the interests in the proceeds of the sale of land in partition of certain parties, who are absent from the state, who are non-residents, who are not known or named in the proceedings, or who, from any cause, are not in a situation to receive the same, are in his hands unpaid and unclaimed; or, if upon final settlement of the receiver of any company or corporation which has been doing business in this state, there is money in his hands unpaid and unclaimed, in each and every such instance such real and personal estate shall escheat and vest in the state, subject to and in accordance with the provisions of this chapter."

If Section 620, supra, were all we need to construe on passing upon this question, it would indicate that no more than a reasonable search for heirs of deceased would be required in a case where a person dies intestate leaving no heirs capable of inheriting. The words "have no heirs" was defined in the case of Robinson et al. v. State, 117 S. W. (2d) 809, as follows:

"It is first asserted the finding stated is not a finding that William Bradford died having no heirs. Wherefore, the judgment in the State's favor was unauthorized. This proposition is ruled against appellants by the opinion reported in Tex. Civ. App., 109 S. W. (2d) 559. It was there held the phrase 'having no heirs,' means no known heirs, and no heirs who can be ascertained by the exercise of reasonable diligence. That is, such diligence as a reasonably diligent person would exercise in the transaction of his own business under the same or similar circumstances. We adhere to that ruling, and overrule appellants' first proposition."

July 31, 1945

However, since Section 620, supra, concludes that in each and every such instance such real and personal estate shall escheat and vest in the state, subject to and in accordance with the provisions of this chapter, it is necessary to examine other provisions in this chapter to properly construe said section.

Section 621 of Chapter 3, Article 1, R. S. 1939, provides that within one year after final settlement of any executor or administrator, assignee, sheriff or receiver, all moneys in his hands unpaid or unclaimed, as provided in Section 620, supra, shall, upon the order of the court in which such settlement is made, be paid into the state treasury.

Section 622 of the same chapter and article, R. S. 1939, provides for proceedings when moneys are not paid into the state treasury by executors, administrators, assignees, sheriffs or receivers, as provided by law.

Section 623 of the same chapter and article, R. S. 1939, provides the method of recovering funds paid into escheat funds by executors, administrators, assignees, sheriffs or receivers. Therefore, it is quite apparent that the legislative intent in enacting the escheat law in this state clearly was that no funds shall escheat to the State of Missouri until a final report of settlement or adjudication shall be made by some court establishing certain necessary facts, in the absence of some special statute or constitutional provision making an exception to the rule.

The administration laws of this state require granting of letters of administration and appointment of an administrator. Also, if an estate is insufficient to have administration thereon, that is, if after allowing the widow her statutory allowance for herself and minor children there remains no balance, the Probate Court may refuse to grant letters of administration. (See Section 2, R. S. 1939.) Section 106, R. S. 1939, further provides what allowances a widow is entitled to keep for herself and minor children.

In connection with the proper disposition of said funds, since some of these estates are very small, we probably should consider the functions of a public administrator. Section 299, R. S. 1939, authorizes the public administrator to take into his charge and custody the estate of persons dying in his county without any known heirs; also estates of persons and estates of all the insane persons in his county who have no legal guardian and no one competent to take charge of such estates, or to act as such guardian can be found; or is known to the court having jurisdiction who will qualify, or where

6-2814

July 31, 1945

from any other good cause said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost.

Therefore, in view of the foregoing laws of administration, we believe that administration must be had on all property held by stewards of various state institutions, said property being that of the deceased patient and not given to the state for care of said patient in said institutions. However, the Probate Court may grant letters of refusal in cases heretofore mentioned.

Now the question arises as to which Probate Court has jurisdiction in such cases, the Probate Court of the county wherein the deceased lived and resided prior to being admitted to said state institution, or the Probate Court in the county wherein the patient died and the state institution may be located. This depends upon the facts in each individual case and no two may be identical. We believe the provisions hereinabove quoted on probate proceedings of insane persons found in the county have reference to those patients that have been residents in the county prior to being adjudged non compos mentis, and does not refer to patients having a residence in another county and then sent to a state institution for care, and also that a person does not lose a residence by being sent to a state institution. Neither does a person lose a residence by temporarily being absent from his residence if his intention is to retain his residence and not change same. (See State ex rel. v. Wurdeman, 129 Mo. App. 263, l.c. 278; State ex rel. v. Mills, 231 Mo. 493.) So you can readily see the many complications that may arise in passing upon such questions.

A greater part of the funds now held and belonging to deceased patients is of long duration, some being in custody for as long as 20 years, and in many instances the amount is very small, in fact too small to have any probate proceedings thereon and the court costs would in all probability exceed the amount of said fund. In view of these facts and many complications arising upon distributing said funds, we respectfully suggest that the Board of Managers prepare, submit and recommend passage of a bill to the 63rd General Assembly which bill would cause such funds to escheat to the State of Missouri without the necessity of any court procedure and thereby avoid court costs. This would solve all your trouble with this fund, and anyone within 21 years thereafter claiming any part of such funds could recover as provided in the bill. We suggest that such a bill follow the escheat law passed by the 61st General Assembly for purpose of escheating funds held by the Insurance Commissioner, where he was unable to locate persons entitled to certain funds. (See Laws 1941, pages 396, 397 and 398.)

July 31, 1945

Therefore, in conclusion we are of the opinion that such funds held by the stewards of various state institutions cannot be used or distributed until administration has been had in the Probate Court in the county wherein such deceased persons had their residence. However, to avoid many complications which are bound to arise, we respectfully recommend a bill be passed by the 63rd General Assembly, as hereinabove proposed, for the purpose of escheating such funds now in custody of the stewards of various state institutions, and also for the purpose of escheating any similar funds coming into their possession in the future under similar circumstances.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

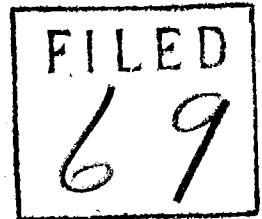
APPROVED:

J. E. TAYLOR
Attorney General

ARH:ml

PENAL INSTITUTIONS: Where inmates of the Intermediate Reformatory at Alcoa have escaped and then sentenced to the Penitentiary, their sentences are concurrent.

August 24, 1945



Honorable W. C. Parker
Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Mr. Parker:

We are in receipt of your letter of August 14, 1945, requesting an opinion of this department. Your letter reads as follows:

"We have several inmates in this penitentiary who have detainers on them from the Intermediate Reformatory at Alcoa, wanted there for escaping. It appears to us that the proper way of handling them would of been to have them serve the Alcoa sentence first, then serve the penitentiary.

"In the case of James E. Robbins, #44869, he was sentenced to the Intermediate Reformatory at Alcoa, for a term of 2 years on October 30, 1940. He escaped from that institution on October 9, 1941, and was received at the penitentiary on December 15, 1941, to serve a term of 9 years for the crime of assault with intent to kill. On January 2, 1942, the Superintendent of Alcoa Farms placed a detainer on this subject and it is still pending.

"Inasmuch as the time elapsed since being brought back is more than enough to complete the Alcoa sentence,

but was not credited that way, is it still legal to make him serve that Alcoa sentence when released on his penitentiary sentence?"

The question which you desire to be answered appears to be: "Inasmuch as the time elapsed since being brought back is more than enough to complete the Alcoa sentence, but was not credited that way, is it still legal to make him serve that Alcoa sentence when released on his penitentiary sentence?"

This presents the question of concurrent and consecutive or cumulated sentences. *Is cumulative?*

When an inmate of the Intermediate Reformatory has been paroled and commits another crime while out and is sentenced to the Penitentiary, unless the trial court takes this into consideration and makes his sentence cumulative or consecutive, then his sentences are concurrent and should be so credited.

This question has been fully considered and passed on in the case of Anthony v. Kaiser, 169 S. W. (2d) 47, 1. c. 49, 50, wherein the court said:

"Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them.' * * * * * At the time of the second, the court either knew, or did not know, he was already under sentence, and, in its discretion, could have imposed either a cumulative or a concurrent sentence. If the court had such knowledge, and its sentence contained no direction that it be cumulative, an intention is thereby evinced that the sentences should be served concurrently. On the other hand, if the court had no such knowledge there would have been no occasion to even consider the question of imposing a successive term, and so the court could have had no intention other than its sentence should begin forthwith. Zorbst v. Lyman, supra. Therefore, with no applicable

August 24, 1945

statute making the two terms successive, and in the absence of a direction in the sentence or commitment to that effect, we think, under the rule stated in the Meininger case, supra, and from what has been said above, petitioner's terms were concurrent, and he is entitled to his discharge under the three-fourths rule. It is so ordered.

"All concur, except GARNETT, J., absent."

Since the Supreme Court has ruled upon this in cases of a paroled inmate, it would follow that there should be no difference whether the inmate was on parole or whether he had escaped, for the legal effect of his sentences would be the same.

Therefore, when an inmate has escaped from the Intermediate Reformatory at Alcoa and has been tried and convicted for the commission of another crime and sentenced to the Penitentiary, unless the trial court indicates its intention of how such sentences are to be served, they should be credited as concurrent sentences and both be served at the same time.

The fact that the Superintendent has placed a detainer would not justify the returning of the prisoner to the Intermediate Reformatory to serve out his old sentence. Such detainer is of no legal effect and should be disregarded.

If the sentences had been made consecutive or cumulative by the trial court then such inmate should serve his old sentence first before starting on his new or subsequent sentence.

Conclusion

Therefore, it is the opinion of this Department that, without direction of the trial court, such sentences are concurrent and the detainer so filed should be disregarded and the prisoner discharged upon completion of his Penitentiary sentence.

Respectfully submitted,

APPROVED:

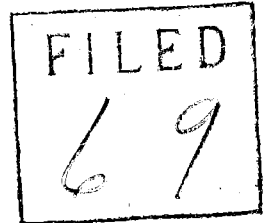
GORDON P. WEIR
Assistant Attorney General

J. E. TAYLOR
Attorney General

GPW:EG

107
ELEEMOSYNARY: : Whether or not the full time plumber employed
INSTITUTIONS: the State Hospital No. 2 St. Joseph,
Missouri is exempt from the St. Joseph ordinance
requiring a license for plumbers.

September 27, 1945



Honorable W. R. Painter, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Painter:

On August 30, 1945, you requested an opinion of this office, which letter reads as follows:

"We have a verbal opinion from your office to the effect that a plumber employed at State Hospital #2, St. Joseph, who gives his entire time to state work is exempt from the City of St. Joseph ordinance requiring a license for plumbers and we have so informed the Superintendent of the hospital. However, will you please give us a written opinion, per request of the city department."

The St. Joseph ordinance referred to in your letter was enacted pursuant to the requirements of Article 20, Chapter 38, R. S. Mo., 1939. The pertinent sections of this article are set out below. Section 7560, R. S. Mo. 1939, reads as follows:

"That any person now or hereafter engaging or working at the business of plumbing in cities or towns of fifteen thousand or more inhabitants in this state, either as master plumber or journeyman plumber, shall first receive a certificate thereof in accordance with the provisions of this article."

Section 7561, R. S. Mo. 1939, reads as follows:

"Any person desiring to engage or work at the business of plumbing, either as a master plumber, employing plumber or as a journeyman

plumber, in cities having a population of fifteen thousand or more, shall make application to a board of examiners herein-after provided for, and shall at such times and places as said board may designate, be compelled to pass such examination as to his qualifications as said board may direct. Said examination may be made in whole or in part in writing and shall be of practical and elementary character, but sufficiently strict to test the qualifications of the applicant."

Section 7563, R. S. Mo. 1939, reads as follows:

"Said board of examiners shall, within ten days, after their appointments, meet and shall then designate the times and places for examination of all applicants desiring to engage in or work at the business of plumbing within their respective jurisdiction. Said board shall examine said applicants as to their practical knowledge of plumbing, house drainage and ventilation, and if satisfied of the competency of such applicants, shall thereupon issue a certificate to such applicant authorizing him to engage in or work at the business of plumbing either as a master plumber or employing plumber or journeyman plumber. The fee for a certificate for a master plumber or employing plumber shall be \$5.00 for a journeyman plumber it shall be \$1.00. Said certificate shall be valid and have force throughout the state and shall be renewable annually, and all fees received for said certificates shall be paid into the treasury of the city where such certificates are issued."

Section 7565, R. S. Mo. 1939, reads as follows:

"Each city with a population of fifteen thousand or more in the state shall, by ordinance, within three months after the passage of this article, prescribe rules and regulations for the material

construction and inspection of all plumbing and sewerage placed in, or in connection with any building in each city, and the board of health or proper authorities shall further provide that no plumbing work shall be done without a permit being issued therefor upon such terms and conditions as said city shall prescribe."

Article I of Chapter 51, R. S. Mo. 1939, relates to the state eleemosynary institutions.

Section 9263 of Article I, R. S. Mo. 1939, relates to the authority of the Board of Managers of such institutions and reads as follows:

"The Board of Managers shall have authority to make all necessary rules, regulations and by-laws for the government, discipline and management of each institution not inconsistent with the laws of this state, and such rules, regulations and by-laws, when so made and adopted by the board, shall be binding upon all officers and employees of the institution, and shall remain in force and effect until changed or annulled by the Board by an order entered upon the records of such institution."

Section 9278 of the same article, R. S. Mo. 1939, relates to the superintendent of the individual institutions and reads as follows:

"The person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution with special attention to the health and sanitation of the respective institution over which he has been appointed as manager, and shall devote his entire time thereto, and shall receive, unless otherwise provided for, the sum of \$3,600.00 per annum, to be paid monthly, together with all necessary and actual traveling expenses. The superintendent of the Missouri state school shall receive the sum of \$3,600.00 per annum, to be paid in monthly installments, together

with all necessary and actual traveling expenses."

We think the questions presented in the matter before us are:

(1) Does the plumber, devoting his full time to the State Hospital No. 2 at St. Joseph, fall within the provisions of the Plumbers' Act set out above as one who is "engaged in the business of plumbing."?

(2) Does the plumbers' law apply to those engaged in work for State Hospital No. 2?

The phrase "engaged in business" is defined as that employment or occupation which occupies the time, attention and labor for the purpose of a livelihood or profit. (Wilson v. State Tax Commission, 54 Pac.(2d) 363, 176 Okla. 90; People ex rel. Allied Stock v. Graves, 294 N. Y. Supp. 995; Comer v. State Tax Commission, 69 Pac.(2d) 936, 41 N. M. 403; Mass Protective Ass'n. v. Lewis, (C.C.A. Pa. 1934) 72 Fed.(2d) 952; Sempale v. Schwartz (1908 Mo. App.) 109 S. W. 633.

We think the plumber at State Hospital No. 2 falls within the definition above, since he is working at his occupation as means of a livelihood and the fact that he performs all of his work for one person would not take him out of this classification. We find no cases which would indicate the contrary.

We think, therefore, that the plumber in question is not exempt from the state law relating to plumbers by reason of the fact that he is not "engaged in the business of plumbing" within the terms of the statute.

Regarding the second question, three inquiries must be made, (1) is an employee of the state, of an institution of the state, exempt from a general state law merely by reason of such employment. (2) Does the act relating to eleemosynary institutions give the state or the agents thereof control over the management of the institution to an extent which would exclude the application of the Plumbers' Act in the present situation, and, (3) what was the intent of the Legislature in enacting Article 20, Chapter 38, R. S. Mo. 1939, relating to the licensing of plumbers.

We find no statutes or cases exempting state employees as a whole or exempting the employees of any state institution from the general laws of the state. There is, therefore, no authority per se for exempting such employees.

It will be noticed that Section 9263, quoted above, which sets

out the authority of the Board of Managers as agents for the state in the management and control of the state eleemosynary institutions, gives said Board complete control and management "not inconsistent with the laws of this state." The statute thus limits their authority to action which is not inconsistent with other laws of this state. Since the Plumbers' Act is a general law of the state, we think the Board of Managers of the eleemosynary institutions would be required to comply with the terms of this statute unless its action in any given situation was not inconsistent with the Plumbers' Act.

Section 9278, quoted above, gives the superintendent of each institution complete powers over the management of the respective institutions, and also says that he shall give special attention to the health and sanitation of the institution. We find no cases which indicate just how far this broad authority extends, but since all the sections of an Act must be read together in interpreting an Act or a part thereof, (State ex rel. Carroll v. Becker 45 S. W.(2d) 533, 329 Mo. 501; Aff. Carroll v. same, 285 U.S. 380; Logan v. Matthews, 52 S. W.(2d) 989, 330 Mo. 1213; State ex rel. McKittrick v. Carolene Products, 144 S. W.(2d) 153, 346 Mo. 1049) we must read this section together with Section 9263, supra. The latter section gives the Board of Managers of the eleemosynary institutions only that power which is not inconsistent with another state statute. Therefore, we think it apparent that the Legislature did not intend that the superintendent of an institution, who is subordinate to the Board of Managers, should have any greater authority than the Board of Managers. We therefore conclude that the superintendent has no authority which allows action inconsistent with another state law.

We think, therefore, that the final question to be determined is whether or not the action of the Board of Managers or the superintendent of State Hospital No. 2, in not requiring the Hospital plumber to be licensed, would be inconsistent with the Plumbers' Act. This question turns upon whether or not the Legislature intended that the provisions of this law should apply to all plumbers working in the City or whether it could be said that their intention was that a full time employee of a state institution should be exempt therefrom.

It is a well settled rule of statutory interpretation that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication. In C. J. Kubach Co. v. McGuire (1926 Cal.) 248 Pac. 676, the charter of the City of Los Angeles prohibited buildings constructed in a certain area from exceeding the height of one-hundred and fifty feet. The building in question was in this area. A contract

was let for this building but the contractor refused to sign it on the grounds the plans would be in violation of the city charter. Held, the charter provision was not applicable to any action by the city. The court in that case said:

"*In the interpretation of a legislative enactment it is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication."

In *Commonwealth v. Allen* (1930 Ky.) 32 S. W. (2d) 42, the State of Kentucky purchased certain property at delinquent tax sales. The county attorney, for the state, attempted to bring suit to recover possession of the land. The circuit clerk refused to allow the suits to be filed until the filing fee was paid. The state contended it did not have to pay the fees. Held, the general statute authorizing the clerk to collect fees did not apply to the sovereign. The clerk was an agent of the state and was therefore merely collecting the fee for the state. In referring to this general statute, the court said:

"* * *The rule as to such a statute is well settled as follows:

"The state, or the public, is not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless expressly named therein, or included by necessary implication."

In *Nelson v. McKenzie Hague Co.* (1934 Minn.) 256 N. W. 96, the plaintiff sued to recover damages for nuisance due to the construction by defendant contractor, as agent of the state, of a highway near the plaintiff's home. The defendant contended that it was not liable under the general state statute providing for liability for causing a private nuisance because they were proceeding to perform a duty owing to the sovereign state. Held, the defendant was not liable since it was an agent of the state and the state would not be liable under the statute. In referring to the general rule, the court said:

"While that rule was born of common-law notions of kingly prerogative, the reason for applying it in our representative government is equally cogent, for so applied it has the 'same ground of expediency and public convenience.' 25 C.L.

784; 59 C.J. 1121; Commonwealth v. Baldwin, 1 Watts (Pa.) 54, 26 Am. Dec. 33; People v. Herkimer, 4 Cow. (N.Y.) 345, 15 Am. Dec. 379 (Anno. 380); State ex rel. Davis v. Love, 99 Fla. 333, 128 So. 374. In United States v. Hoar, 2 Mason, 311, 314, Fed. Cas. No. 15,373, Mr. Justice Story in discussing this question said: 'But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.' See, also, State v. City of Milwaukee, 145 Wisc. 131, 129 N.W. 1101, annotated in Ann. Cas. 1912A, at page 1214."

In *Clements v. Sherwood* (1942 Ohio) 45 N.E. (2d) 805, the petitioners asked a declaratory judgment determining the number of hours which employees of the State of Ohio could work. The general statute of the State set maximum hours which female and minor employees could work in work-shops and factories of the State. Held, such general statutes did not apply to employees of the State. The court pointed out that these general statutes applied to general employment of the individuals enumerated and that neither had any reference to those employed by the State. However, the court further said that general statutes do not bind the State unless they expressly so indicate. The Court, 1.c. 807, said:

"Judge Allen, delivering the opinion of the court, on page 246 of 126 Ohio St., on page 58 of 185 N.E., discusses this matter at some length, and cites a

number of supporting opinions. She there states that it is the contention of the state that the state as a sovereignty is not bound by the terms of a general statute unless such statute expressly applies to the state. She states: 'This is a well-established doctrine,' citing cases in support thereof. It will thus be seen that these two general statutes, even though they might apply to the very character of work done by the employees whose position is now in question, do not control the state in its employment for the reason that as a sovereignty it is not bound by the terms of these general statutes."

The same general rule of statutory interpretation has been followed in other jurisdictions. *Desantis v. Delaware, L. and W.R. Co.* (1933 N.J.), 165 A. 119; *Cranfield v. City of Winston, Salem* (1931 N.C.) 158 S.E. 241; *State Land Bd. v. Campbell* (1932 Ore.), 13 P. (2d) 346; *Culver v. Commonwealth* (1944 Pa.), 35 A. (2d) 64; *Comm. of State Ins. Fund v. Derowitz* (1942) 39 N.Y.S. (2d) 34; *Yancey v. N.C. St. Hl. Comm.* (1942 N.C.) 22 S.W. (2d) 256; *State v. McVey* (1942 Ore.) 121 P. (2d) 461.

In *Fulton v. Sims* (1908) 127 Mo. App. 677, the city of Fulton had passed an ordinance requiring all purchases of coal to be weighed on city scales. The state insane asylum bought coal and did not weigh the same on the city scales. The Kansas City Court of Appeals held that since the state institution had the power to purchase coal for its own consumption and use, it was not required to comply with the city ordinances. The court said that the state institution was under the control and management of the state and had been granted specific powers to purchase goods, that since the powers of the city were derived from the state the state could withhold certain powers from the city. They then stated that the power to purchase in any way deemed advisable had been granted to the state institution and thus any power over such purchases had been withheld from the city. The Court in that case, l.c. 681, 682, said:

"The coal sold by the defendant was for supplies to a State institution which is conducted under the control and management of the State. It is especially provided by statute that the board of managers of the institution shall purchase supplies for its use and consumption (Section 7708, Revised Statutes 1899). The city of Fulton and the hospital for the insane are

each under the control of the State and the functions of each are separately provided for. In the respect here considered, each is independent of the other, and we therefore can discover no reason, in the absence of statutory provisions, supporting the city in interfering with the hospital in the purchases which the statute authorizes it to make for itself. (Ky. Institution for the Blind v. Louisville, 97 S.W. 402.) That case arose over the city attempting to compel the institution to provide certain fire-escapes for its buildings, and we consider it to be in point in the present controversy. The Kentucky Court of Appeals among other things said that 'The municipal government is but an agent of the State--not an independent body. It governs in the limited manner and territory that is expressly or by necessary implication granted to it by the State. It is competent for the State to retain to itself some part of the government even within the municipality, which it will exercise directly, or through the medium of other selected and more suitable instrumentalities. How can the city have ever a superior authority to the State over the latter's own property, or in its control and management? From the nature of things it cannot have.'"

The Fulton case indicates the application of the general statutory construction rule to a situation very similar to that found in the instant situation. The Court indicated that, where the statute had given the eleemosynary institutions general power, this power could not be interfered with by action of a city, it follows that the Court considered that the intention of the Legislature was that, where it had delegated authority to the eleemosynary institutions, such authority was to be exercised without interference by city ordinances.

From the foregoing cases we are of the opinion that the intention of the Legislature would be held to exclude the operation of the Plumbers' Act from situations in which state employees of the eleemosynary institutions were involved.

CONCLUSION.

It is, therefore, the opinion of this Department that a plumber,

Hon. W. R. Painter

-10-

September 27, 1945

who is employed full time in the state hospital No. 2 in the city of St. Joseph, is not required to obtain a license in accordance with the ordinances of the city of St. Joseph which require the licensing of plumbers.

Respectfully submitted,

SMITH N. CROWE, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

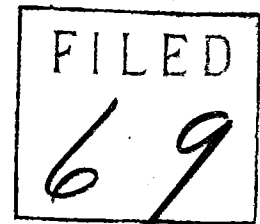
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APPROPRIATIONS:

STATE ELEEMOSYNARY INSTITUTIONS:

Sections 2,5,6 and 7 of H.B. 270
of 63rd General Assembly invalid;
President of Board of Managers
of State Eleemosynary Institu-
tions should disregard same.

October 11, 1945



Honorable W. R. Painter
President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Governor:

We have your letter of recent date which reads
as follows:

"I desire to call your attention to
Section Two, Section Five, Section
Six, and Section Seven of House Bill
270 appropriating money for various
hospitals in the city of St. Louis,
Kansas City, and County hospitals.
Each of these sections provides for
the payment under certain sections
of the Statute which are named in
said section.

"I desire to call your attention to
lines 12, 13, 14, 15, and 16 in Sec-
tion Two; lines 13, 14, 15, 16, 17,
and 18 Section Five; lines 12, 13,
14, and 15, 16, and 17, in Section
Six; lines 13, 14, 15, 16, and 17 in
Section Seven all of them being identi-
cal. There is no law in the statute
books that requires the President of
the Board of Managers of the State
Eleemosynary Institutions to certify
any of these accounts except these
lines in the appropriation bill and
they are invalid, as I understand it,
as enactment of law is not allowed
in the appropriation bills."

October 11, 1945

"At the meeting of the Appropriation Committee I asked for funds to investigate these bills, which they refused to give me. The Eleemosynary Board has no funds with which to pay for the examination of these accounts. I am not doubting the correctness of the accounts, I mean that I should not certify this account unless it has been investigated and can really certify to its being a fact.

"I wish that you would give me your opinion as to my duty in this matter."

H.B. 270 is an Appropriation Act. Its title reads as follows:

"Appropriating money for the support of the Eleemosynary Institutions of the State, Commission for the Blind, Pensions for the Deserving Blind, Charity Patients at County Hospitals, for the period beginning July 1, 1945 and ending June 30, 1946, with an emergency clause."

Each of said Sections contain a proviso which undertakes to require an approval by you before any of the funds provided therein shall be audited and paid by the State. The provisos in Sections 5, 6 and 7 are identical in language, and the proviso in Section 2 has the same effect as those in the other Sections. The proviso in Sections 5, 6 and 7 reads as follows:

"PROVIDED, the State Auditor shall not audit, and the State Treasurer shall not pay any claim out of this appropriation to any such hospital unless such claim has first been examined and approved by the President of the Board of Managers of State Eleemosynary Institutions."

You submit the question as to what your duties are in view of the said provisos. It is first necessary to determine whether said provisos are valid and binding.

It is well-established in this State that general legislation cannot be included in an Appropriation Act. In *State ex rel. vs. Thompson*, 316 Mo. 272, 289 S.W. 338, the Court was considering an Act which appropriated money for payment of salaries of the personnel of the Board of Permanent Seat of Government. Said Appropriation Act also contained the following provision:

"Sec. 100. Salary--How Determined.--No salary for any official or employee, either elective or appointive, provided for by this appropriation act, shall be in excess of the salary provided by statutory law for such official or employee, and in all cases where the salary of any such official or employee is not definitely fixed by statutory law, no salary paid by virtue of this appropriation act shall be in excess of the salary paid to the officer or employee holding such position the previous biennium."

In discussing the foregoing provision the Court said: 289 S.W. 338, l.c. 340:

"It is manifest that the real purpose of this provision was an undertaking to regulate, determine, and fix the salaries of all such officers or employees affected by the Appropriation Act whose compensation might not be fixed at all by statutory law, or, if at all, where the statute fixed a maximum only. This provision has no other character than that of general legislation, and to inject general legislation of any sort into an appropriation act is repugnant to the Constitution (article 4, Sec. 28, Constitution of Mo.), and the appropriation

October 11, 1945

bill, as provided by the Constitution (article 4, Sec. 28), may have a plurality of subjects, while a bill for general legislation may have but one.

"An appropriation bill is just what the terminology imports, and no more. Its sole purpose is to set aside moneys for specified purposes, and the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations. * * * * *

Here we have an appropriation act which not only appropriates money for the various subjects embraced therein, but which attempts to fix and regulate all salaries affected by the act which either have not been fixed by any statute, or not definitely fixed, which would include all salaries where the maximum alone was named. That the Legislature has the right by general statute to fix salaries is beyond question, but has it the right to do so by means of an appropriation act? We think not."

* * * * *

"Our Constitution (section 28, art. 4), is the one certain safeguard against such distracting possibilities and should be strictly followed. We hold, therefore, that section 100 of the appropriation Act, under our Constitution, is unconstitutional and void, and it follows that our peremptory writ of mandamus should be granted."

The ruling in the above case was followed in the case of State ex rel. vs. Smith, 325 Mo. 1069, 75 S.W. (2d) 828, where the Court said, 75 S.W. (2d) 828, l.c. 830:

"Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend

October 11, 1945

section 13525, it would have been void in that it would have violated section 28 of article 4 of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as section 13525, and the mere appropriation of money are two entirely different and separate subjects. State ex rel. Hueller v. Thompson, State Auditor, 316 Mo. 272, 289 S.W. 338."

Both of the above cases were followed in State ex rel. vs. Canada, 342 Mo. 121, 113 S.W. (2d) 783, where the Court said, 113 S.W. (2d) 783, l.c. 790:

"* * * A general statute (section 9622, R.S. 1929 (Mo.St.Ann. Sec. 9622, p. 7328)) authorizes the board of curators of Lincoln University to pay the reasonable tuition fees of negro residents of Missouri for attendance at the university of any adjacent State. This statute cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of article 4 of the Constitution, which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. State ex rel. Davis v. Smith, 335 Mo. 1069, 75 S.W. (2d) 828; State ex rel. Hueller v. Thompson, 316 Mo. 272, 289 S.W. 338. * * * "

The judgment in the latter case was reversed by the U. S. Supreme Court, but said reversal did not affect the above portion of the opinion (305 U. S. 337, 83 L. Ed. 208).

H.B. 270 is designed to appropriate money for certain specific purposes, but the provisos referred to above are designed to provide certain methods to be followed by officers in connection with the disbursement of such funds. Regulating the duties of officers is a matter of general legislation, and, therefore, has no place in an Appropriation Bill.

Section 9360, R.S. Mo. 1939, reads as follows:

"Any county or city in this state which shall maintain from public funds a hospital for the care, detention or treatment of the insane, which hospital is properly equipped as to facilities, staff and personnel, shall be entitled to \$8.00 per month per patient, upon proper report filed and sworn to by superintendent or surgeon in chief of such hospital for the insane, when such proper report is filed with the state eleemosynary board. Such reports shall be filed quarterly and shall show name, address and other necessary data so as to properly identify and authenticate the patients of such insane institution."

Section 9361, R.S. Mo. 1939, authorizes the State Eleemosynary Board to examine the list of patients referred to in Section 9360, so as to determine if said list is correct and authentic. Neither of said Sections requires the State Eleemosynary Board nor any officer thereof, to approve said list before payment can be made. Section 9360 expressly provides payment shall be made "upon proper report filed and sworn to by superintendent or surgeon in chief of such hospital for the insane, when such proper report is filed with the state eleemosynary board."

October 11, 1945

The effect of the proviso in Section 2 of H.B. 270 would be to add another requirement to the method provided for in Sections 9360 and 9361, *supra*, before disbursements could be made out of the funds appropriated by said Section 2.

Section 15178, R.S. Mo. 1939, provides that the money appropriated for payment of the patients in hospitals mentioned in Section 5 of H.B. 270, shall be disbursed as follows:

"* * * The chairman and secretary of such board of commissioners shall make report to the treasurer of said board, once per month, giving the names and number of patients in such hospital and indicating which patients are subjects of charity and the amount necessary for the state to pay. The treasurer of said board shall issue a voucher to the state auditor, giving this information; and the auditor shall draw his warrant on the state treasurer for the amount shown by such statement, and the state treasurer shall pay said warrant to the treasurer of said board of tuberculosis hospital commissioners; * * * ."

It will be seen therefore, that the proviso in Section 5 of H.B. 270, would add an additional requirement to be performed before disbursement of the funds in said Section 5 mentioned could be disbursed, and, therefore, would be in effect, an Amendment of Section 15178.

Section 15181, R.S. Mo. 1939, controls the disbursement of funds appropriated by Sections 6 and 7 of H.B. 270.

Said Section provides, in part, as follows:

"* * * The director of the department of public health of such city shall make a report to the city treasurer once per month giving the names, addresses, and hospital numbers of

charity patients in such hospital and the amount necessary for the state to pay. The treasurer of the board shall issue a voucher to the state auditor giving this information and the auditor shall draw his warrant on the state treasurer for the amount shown by such statement and the state treasurer shall pay said warrant to the treasurer of said city, who shall deposit and credit the same to the credit of such hospital for the support of such charity patients, and for no other purpose.* * *

The effect of the proviso in said Sections 6 and 7 of H.B. 270 would be to add an additional requirement to be met before disbursements could be made under said Sections, and, therefore, said provisos are an attempt to amend Section 15181.

How and when the funds appropriated for the purposes set forth in Sections 2, 5, 6 and 7 of H.B. 270 shall be disbursed is therefore, provided for by the above general statutes, and the provisos under consideration amount to an attempt to amend said general statutes by making additional requirements to be met before disbursements may be made. Under the decisions of the Supreme Court above referred to, such Amendment cannot be accomplished by an Appropriation Act, and, therefore, the provisos in Sections 2, 5, 6 and 7 of H.B. 270 are invalid, and of no effect.

The fact that the provisos above referred to are invalid, does not affect the appropriations made by said Sections of H.B. 270, however, in *State ex rel. vs. Thompson*, 289 S.W. 338, 1.c. 341, the Court said:

"The question remains, Does the invalidity of said section 100 render the entire Appropriation Act void? We hold that it does not. It is well settled that a legislative act may be void in part, leaving the remainder a good and valid statute, where the part that is valid may be separated from the part that is void. *State ex rel. v. Gordon*, 236 Mo. loc. cit. 170, 139 S.W. 403; *State ex rel. v. Taylor*, 224 Mo. 474, 123 S.W. 892."

October 11, 1945

Likewise, in State ex rel. vs. Canada, 113 S.W. (2d) 783, 1.c. 790, the Court said:

"* * * The valid and invalid portions of the statute are separable. If we disregard the invalid proviso, there is left a complete workable statute which appropriates the sum of \$10,000 for the purposes therein named. * * * "

Ordinarily, it is not the duty of a public officer to question the validity of statutes. It is his duty to obey the statutes as enacted by the Legislature until the Courts have declared such statutes invalid. However, in your situation you are confronted with two inconsistent statutes governing the same subject, to-wit, the method of disbursement of particular funds. You, of necessity, must therefore question one of the statutes, and refuse to follow it. You have no other alternative, and you must therefore determine which of the two conflicting statutes you are to follow in the situations you present in your letter.

CONCLUSION.

It is, therefore, the opinion of this office that the provisos in Sections 2, 5, 6 and 7 of H.B. 270 of the 63rd General Assembly, are invalid, and should be disregarded, and that disbursements of funds appropriated by each of said Sections should be made in accordance with the provisions of the general statutes referred to in said Sections, said general statutes being Sections 9360, 15178 and 15181, R.S. Mo. 1939, respectively.

Respectfully submitted,

APPROVED:

HARRY H. KAY
Assistant Attorney General

J. E. TAYLOR
Attorney General

HHK:ir

STATE ELEEMOSYNAL INSTITUTIONS:

A person previously a patient at a Kansas State Hospital for epileptics is not a proper charge of the state of Missouri in its state hospital for the insane.

November 2, 1945

FILED

69

Mr. W. R. Painter, President,
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Painter:

We acknowledge receipt of your request for an opinion of this department in your letter of October 24, 1945, which letter reads as follows:

"Enclosed find papers from Dr. Ralph Hanks, Superintendent at State Hospital #3, Nevada, concerning Noel Luther Ryman. Please return the letter to me after it has served its purpose.

"As you will note, Mr. Ryman was a patient at State Hospital for Epileptics at Parsons, Kansas, for thirteen years. He escaped and came to Missouri. His father, who previously lived in Kansas, had moved to Dallas County, Missouri. His father had the boy committed through the County Court of Dallas County to State Hospital #3, Nevada, Missouri. The State Hospital at Parsons, Kansas, is willing to take the boy back provided his father wants to send him.

"Please give us your opinion as to whether or not this is a just charge to the State of Missouri, or if the boy should be returned to the State Hospital in Kansas. We would appreciate your opinion as early as possible because the matter has caused quite a bit of flurry in that section of the State."

The provisions for commitment of poor persons to state hospitals of Missouri are contained in Article II, Chapter 51, R. S. Mo. 1939. This Article makes provision for the county courts to send insane poor persons to a state hospital when they are entitled to admission thereto, and provides the procedure for accomplishing this commitment.

Section 9328 of this Article reads, in part, as follows:

"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. * * *"

Section 9335 of this same Article reads as follows:

"For the admission of county court patients the following proceedings shall be had: Some citizen residing within the county, of which the alleged insane person is a resident, shall file with the Clerk of the County Court of such county a verified statement in writing which shall be substantially as follows:

"State of Missouri) ss.
County of _____)"

The undersigned, a citizen residing in the county and state aforesaid, on his oath, according to his best information and belief states; that _____, a resident of the county and state aforesaid is insane; that his insanity is less than _____ year's duration; the said _____ has not sufficient estate to support him at a state hospital for the insane; that the said _____ (is or is not) so deranged as to endanger himself or others and _____ (will or will not) be dangerous to the safety of the community by being at large and that he _____ (is or is not) now being confined or restrained; and that the foregoing facts can be proved by _____ and _____ (naming at least two persons one of whom shall be a reputable physician).

Dated this _____ day of _____, 19____.

Subscribed and sworn to before me this _____ day of _____, 19____.

County Clerk."

(R. S. 1929, Sec. 8643. Reenacted, Laws 1937, p. 509).

November 2, 1945

Section 9356 of the Article reads, in part, as follows:

"No person shall be entitled to the benefit of the provisions of this article as a county patient, except persons whose insanity has occurred during the time such person may have resided in the state, and except the insane poor under sentence as criminals, as provided in Sections 9348 to 9352, inclusive of this article.* * *"

Under the provisions of Section 9328, supra, the county court is authorized to commit insane poor to state hospitals when they are entitled to admission. A careful examination of Article II, Chapter 51, R. S. Mo. 1939, reveals that there are two sections setting out the conditions which entitle such person to admission to a state hospital. They are sections 9335 and 9356, supra. The statute places in the county court the authority to determine whether these conditions have been met. The county court, in committing Mr. Ryman must have found that these conditions were all complied with.

Our opinion must, therefore, deal with whether or not the county court committed error in finding as they did on certain of these conditions. An examination of the facts of the present situation, as set out in the correspondence referred to us, leads us to the conclusion that we would be logically correct in questioning only two of the county court's findings. They are (1) the matter of the residence of Mr. Ryman and (2) that Mr. Ryman's insanity occurred in the State of Missouri.

Therefore, we think the determination of the matter presented in your letter of October 24, 1945, depends upon the answers to the following questions:

1. Was the patient a resident of the State of Missouri and the County of Dallas at the time of his commitment?
2. Did the patient's insanity occur while he was a resident of the state which committed him?

In order to commit an insane person to the state hospital the county court must find not only that the person is insane but also that he is a resident of the county which commits him. (Thomas v. Macon County, 74 S. W. 999, 175 Mo. 68.

Your letter of October 24, last, with the attending correspondence, shows that Mr. Ryman had been in a state hospital for epileptics in the State of Kansas for thirteen (13) years immediately preceding his commitment by the Dallas County court, that his father had formerly

November 2, 1945

lived in Kansas, and that Mr. Ryman had escaped from the Kansas hospital around September 4, 1945, and was committed by the Dallas County Court on September 5, 1945, to the Missouri state hospital. It also shows that Mr. Ryman is now twenty five (25) years of age. This would have made him twelve (12) years old when he was committed to the Kansas Hospital and, of course, would make him a minor at that time. The question of his residence must be discussed in two phases. The first is that of what his residence would be if he had been adjudged insane in Kansas at the date of his commitment to the Kansas hospital for epileptics while he was still a minor.

In *Chew v. Nicholson* (1922, District Court, Dist. of Del.) 281 Fed. 400, a girl was adjudged insane at the age of twenty two (22) years. She had been living in Delaware but her mother put her in an asylum in Pennsylvania. The mother was appointed by a Delaware court as trustee of her person and estate. The question in the case was whether she was a resident of Delaware or of Pennsylvania at the time of her death in the Pennsylvania hospital. The court, in discussing the question of domicile said at l.c. 403:

* * * * *

"It has likewise been held that, where an infant is of unsound mind and remains continuously so, the incapacity of minority continues, so as to confer on the father the right of choice in the matter of the domicile of the child, and that the father's change of domicile effects a change in the child's domicile. *Sharpe v. Crispin*, L. R. 1 Prob. & Div. 611; *Wharton's Conflict of Laws*, Sec. 53."

* * * * *

The court in this case approved of this rule but refused to extend it to the situation regarding the change of domicile by a guardian of a person who was adjudged insane after attaining majority. This case has not been overruled and we do not find any contrary authority on this proposition. The fact that Mr. Ryman had been in a hospital in Kansas would not affect the matter of his residence since the courts hold that commitment to a state hospital does not work a change in the domicile or residence of a person. (*Chew v. Nicholson*, supra; *Kuphal v. Kuphal* (1941 Supreme Court) 29 N. Y. Supp. (2d) 868; *Squire v. Vasquez* (1936 Ga. App.) 184 S. W. 629.)

Therefore, we are of the opinion that, if Mr. Ryman was adjudged insane before his majority, his domicile would follow that of his father. Your letter shows that his father was a resident and dom-

November 2, 1945

iciled in Missouri when the boy was committed by the Dallas County court. If Mr. Ryman was adjudged insane before majority the Dallas County Court had the authority to find that the residence requirement for commitment to a Missouri hospital was complied with.

The second phase is that arising if Mr. Ryman had never been adjudged insane before he came to Missouri, under such circumstances the question of residence would depend upon his ability to form the intent and to choose a domicile for himself, these being the two elements necessary to acquire domicile or residence. (Bradshaw v. Bradshaw, 166 S. W. (2d) 805; Lewis v. Lewis, 176 S. W. (2d) 556.)

It is the duty of the county court committing a person, to determine whether he had such requisite intent to establish a residence. We are of the opinion that, under the facts of your letter of October 24, 1945, it is highly probable that Mr. Ryman was adjudged mentally incompetent in the State of Kansas and that his residence, therefore, would have followed that of his father and that he was a resident of Dallas County at the time of his commitment by that county court. If the facts thus assumed are incorrect, the county court of Dallas County evidently found that Mr. Ryman was competent to choose Missouri as his residence and that he was a resident of that county, since this was necessary for a valid order of commitment. If the county court did not find such residence as required by Section 9335, supra, its order of commitment would be invalid.

Assuming, since the County Court so found, that Mr. Ryman was a resident of Dallas County, Missouri at the time of his commitment, we proceed to the second question of whether Mr. Ryman falls within the terms of Section 9356, supra, which provides that no person may be entitled to enter a state hospital as a county patient unless his insanity occurred while he was a resident of the State of Missouri. Your letter shows that Mr. Ryman was committed as a county patient. His case, therefore, would be subject to the provisions of Section 9356, supra.

Under Section 9328, supra, the county court is authorized to determine whether a person is entitled to admission to the state hospital as a county patient. One of the requirements, under Section 9356, supra, necessary for such commitment is that the insanity of the patient occurred while he was a resident of Missouri. If the county court failed to find that Mr. Ryman's disability occurred while he was a resident of Missouri, we are of the opinion that the order of commitment would not be valid. Further, the county court would have no authority to make a valid order of commitment if, in fact, Mr. Ryman's disability did not occur while he was a resident of the State of Missouri.

Under the facts set out in your letter and recited above in this

November 2, 1945

opinion, we believe that we can logically assume that Mr. Ryman's disability did not occur while he was a resident of this state. It is difficult to conceive of the mental disability of a person, who has been in a state hospital for epileptics for the preceeding thirteen years, occurring during a three or four day interval in which he was in this state. If we are correct in an interpretation of the facts as revealed in your letter of October 24, 1945, we are of the opinion that Mr. Ryman's mental disability did not occur while he was a resident of Missouri.

While we think it highly improbable, under the facts as set out in your letter, that Mr. Ryman's insanity occurred in the State of Missouri, it should be kept in mind that if there were sufficient facts showing that such insanity did occur in Missouri, that Mr. Ryman had sufficient capacity to exercise choice and intention as to his residence and that he did so intend to make Missouri his residence, then he would be a proper charge upon the State of Missouri as a county patient. As stated at the outset of this opinion, the county court, by its commitment order, has evidently found that Mr. Ryman is a proper charge upon the state as a county patient. He, therefore, remains such until the order of the county court committing him has been attacked and set aside. If, and when the order of the county court is set aside, as we think it might well be on the grounds discussed above in this opinion, Mr. Ryman would then cease to be a proper charge upon the state.


CONCLUSION

It is, therefore, the opinion of this department that under the facts presented in your letter of October 24, 1945, Mr. Noel Luther Ryman is a proper charge to the State of Missouri as a county patient in State Hospital No. 3 at Nevada, Missouri. However, it is our further opinion that under said facts, the order of the county court committing Mr. Ryman to State Hospital No. 3 might be successfully attacked and said order set aside. In such event, we are of the opinion that Mr. Noel Luther Ryman would not be a proper charge upon the state as a county patient in State Hospital No. 3.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

APPROVED:


J. E. TAYLOR
Attorney General

SNC:mw

26 *Smith*
COUNTY COURTS: (1) Cannot organize firm, partnership or corporation for purpose of operating convalescent home or poor farm; (2) may contract for care of poor with private individuals.

September 12, 1945



Hon. Elmer Peal
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri

Dear Sir:

We acknowledge receipt of your letter of August 27, 1945, in which you request an official opinion from this department. Your letter reads as follows:

"Please give us an opinion as to the creation, or setting up, of "A convalescent, nursing shelter or boarding home for aged, chronically ill or incurable persons within this State without having first obtained a license so to do from the State Board of Health of Missouri. The word person as used in this Act, shall include members of any firm, partnership or association and a corporation and any or all of the officers, managers or board of directors thereof." (Sec. 1, S. B. 142, 1941 Session's Act - Page 368.)

"Section 2 provides that nothing in the Act shall apply to any institution established, maintained or operated by the State, county, city, town or village thereof.

"Does this section preclude any County from organizing a firm, partnership, association Corporation, and then sell or lease a County pauper farm to this form, partnership association or corporation for the purpose of establishing and operating a convalescent home?

"All the above plan for the distinct purpose of obtaining financial help from the Social Security Commission, in the maintenance of the present County home, which financial help is not now available for the upkeep of the pauper farm.

"Would this be an illegal evasion of the law regarding this matter?

"Our present pauper farm set-up is a heavy burden on the tax payers and any financial help would be appreciated by these same tax payers."

Section 9590, R. S. Mo. 1939, provides as follows:

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 9591, R. S. Mo. 1939, provides as follows:

"Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

Section 9593, R. S. Mo. 1939, provides as follows:

"The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any justice of the peace of the county in which any person entitled to the benefit of the provisions of this article resides, shall from time to time,

and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

Section 9594, R. S. Mo. 1939, provides as follows:

"The county court shall at all times use its discretion and grant relief to all persons, without regard to residence, who may require its assistance."

Section 9596, R. S. Mo. 1939, provides as follows:

"The several county courts shall have power, whenever they may think it expedient, to purchase or lease, or may purchase and lease, any quantity of land in their respective counties, not exceeding three hundred and twenty acres, and receive a conveyance to their county for the same."

Section 9597, R. S. Mo. 1939, provides as follows:

"Such county court may cause to be erected on the land so purchased or leased a convenient poorhouse or houses, and cause other necessary labor to be done, and repairs and improvements made, and may appropriate from the revenues of their respective counties such sums as will be sufficient to pay the purchase money in one or more payments to improve the same, and to defray the necessary expenses."

Section 9598, R. S. Mo. 1939, provides as follows:

"Whenever such poorhouse or houses are erected, the county court shall have power to appoint a fit and discreet person to superintend the same and the poor who may be kept thereat, and to allow such superintendent a reasonable compensation for his services."

Section 9600, R. S. Mo. 1939, provides as follows:

"The county court shall have power to make all necessary and proper orders and rules for the support and government of the poor kept at such poorhouse, and for supplying them with the necessary raw materials to be converted by their labor into articles of use, and for the disposing of the products of such labor and applying the proceeds thereof to the support of the institution."

Section 9601, R. S. Mo. 1939, provides as follows:

"The several county courts shall set apart from the revenues of the counties such sums for the annual support of the poor as shall seem reasonable, which sums the county treasurers shall keep separate from other funds, and pay the same out on the warrants of their county courts."

Section 9603, R. S. Mo. 1939, provides as follows:

"It shall be the duty of the superintendent of the poor, or poor farm, as provided for in this article, to keep a book furnished by the county court, and enter therein a book account of all business transactions had or done or caused to be

done by him as superintendent. Said book shall show an itemized account of all farm products, stock and other articles sold by the superintendent or by his authority, and of all articles purchased for the use of the poor, or for the use or improvement of the poor farm or the buildings thereon, and of all expenses for farm labor and other work or services done by order or contract of the superintendent, and of such other items as may be ordered kept therein by the county court."

In the aforesaid sections the Legislature has provided a complete plan and authorization for the county courts to provide for the relief, maintenance and support of aged, infirm, lame, blind and sick persons who are unable to support themselves, and there are no other persons required by law and able to maintain them.

In *Lancaster v. County of Atchison*, 180 S. W. (2d) 706, 1. c. 708, the court held:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void.' *Sturgeon v. Hampton*, 88 Mo. 203, loc. cit. 213. Quoted with approval in the case of *Morris et al. v. Karr et al.*, 342 Mo. 179, 114 S. W. 2d 962, loc. cit. 964."

The fact that the Legislature has set out this complete plan and authority for the county courts to take care of the poor people in their jurisdiction would eliminate any proper implication that any other method was intended by the Legislature for the caring for and maintenance of the poor in the counties of the state of Missouri.

Section 23, of Art. VI, of the Constitution of Missouri of 1945, provides as follows:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

The above constitutional provision would preclude any county from owning or subscribing for stock, or from the lending or granting of any public money or thing of value in the aid of any corporation, association or individual, unless otherwise provided in the Missouri Constitution; and there are no provisions for the county to organize a firm, partnership, association or corporation, for the purpose of establishing and operating a convalescent home.

Section 9854.2, R.S.A. Mo. (Laws of 1941, p. 368, Sec. 2) provides as follows:

"The term 'convalescent', 'nursing', 'shelter', 'lodging', and 'boarding' home for the aged, chronically ill or incurables shall mean any place in which three or more aged, chronically ill or incurable persons, not related by blood or marriage to the owner, operator or manager of said place, are received, kept and provided with food, or shelter and care for hire or compensation, however paid: provided that nothing in this Act shall apply to any institution established, maintained or operated by the State or any county, city, town or village thereof."

The provisions of the above section are declaratory of the fact that no institution established, maintained or operated by the state or any county, city, town, or village

thereof, shall be required to be licensed under the provisions of the act regulating the homes for aged or ill persons.

Section 9607, R. S. Mo. 1939, provides as follows:

"The four preceding sections shall not apply to any county where the support and keeping of the poor is let out by contract, nor to any county where the superintendent rents or leases the poor farm and stocks the same and furnishes the necessary farm implements used thereon at his own expense, and carries on said farm at his own expense."

Under the provisions of Section 9607, supra, it appears that the county courts may, in their discretion, contract for the support and keeping of the poor with private individuals. But, in such case, it would be necessary for a private individual to be regulated and licensed under the provisions of Article 7, "Homes for Aged or Ill Persons," Section 9854.1 to Section 9854.7, R.S.A. (Laws of Mo. 1941, p. 368, et seq.).

CONCLUSION

Therefore, it is the opinion of this department that (1) a county court cannot organize a firm, partnership, association or corporation for the purpose of selling or leasing a county poorhouse for the purpose of establishing and operating a convalescent home; that (2) a county may contract with private individuals for the support and keeping of the poor.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

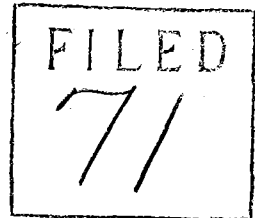
APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

COUNTY BUDGET: RE: May transfer unexpended balance to road and
AND COUNTY COURT: bridge fund and building fund after all out-
standing warrants have been paid.

November 8, 1945



Mr. J. T. Pinnell, Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Mr. Pinnell:

This will acknowledge receipt of your letter of October 18, 1945, requesting an official opinion of this department, which letter reads as follows:

"McDonald County has approximately \$3,000.00 in the Treasury, collected for County Revenue for the years 1942 and 1943; all warrants for said years have been paid.

"Can the County Court legally order a transfer of said surplus to the Road and Bridge Fund and the Building Fund?"

Section 10910, R. S. Mo., 1939, directs the county court to classify proposed expenditures according to the classification therein provided and further directs that priority of payment shall be adequately provided according to the said classification and such priorities shall be sacredly preserved. Said section reads in part as follows:

"* * *The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved. Laws 1933, p. 340. Reenacted, Laws 1939, p. 656, Sec. 1."

You inform us in your request that the county has remaining in the county treasury approximately \$3,000.00 from collections made during the years 1942 and 1943, after all warrants for said years have been paid. You do not specify that all warrants for prior years thereto have been paid, apparently there are no outstanding prior warrants. Section 10911, as amended, page 650, Laws 1941, Class 6,

of the Budget Act specifies that after having provided for the five classes of expenses, heretofore specified, the county court may expend any balance for any lawful purpose, provided however, that if there are any outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized, under class 6. (pages 651 and 652, as amended, Laws 1941)

"Class 6. After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose: Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six: Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

Also in Section 10914 of the Budget Act as amended, Page 652, Laws 1941, Class 6, provides that no warrant may be drawn or any obligation be incurred in Class 6 until all outstanding lawful warrants for prior years have been paid. Class 6, under Section 10914 reads as follows:

"Class 6. Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest: Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

In view of the foregoing provisions of the County Budget Act it is essential that all outstanding legal warrants be paid before any warrant may be drawn under class six, not only those warrants issued during the years 1942 and 1943 but for all the years prior thereto.

In *Holloway to use v. Howell County*, 240 Mo. 601, 1.c. 612 and 613, the court held that under certain statutory conditions the county court has a right to transfer any unexpended balances to other proper funds for county purposes and in so holding the court said:

"* * * It is not clear there was any 'county revenue' left at the end of any year after paying the indebtedness and obligations of the county for the current year. But if there was, then under certain statutory conditions, the county court had the right to transfer it to other proper funds and use it for county purposes for ensuing years or existing deficits, if any, after all contracts entered into with reference to the current year creating present indebtedness had been complied with and all outstanding current county obligations had been satisfied. (*State ex rel. v. Johnson*, 162 Mo. 621; *State ex rel. v. Appleby*, 136 Mo. 408; *Decker v. Diemer*, 229 Mo. 296.)"

Section 13829, R. S. Mo. 1939, specifically authorizes the county court to transfer any balance in any special fund, where it is no longer needed for the purpose for which raised, to the general revenue or to such other fund as in its judgment may need said balance.

"Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance. R. S. 1929, Sec. 12167."

Repeal of statutes by implication are not favored in the law and conflicting statutes should be harmonized and each given effect as far as possible and where two statutes can be given a construction

to uphold both, such construction must be given.

In *City of St. Charles v. Inter Insurance Exchange etc.*, 108 S.W. (2d) 626, l.c. 627, the court said:

"(2,3) Nor does this construction of section 5976 necessarily bring it and section 6840 into repugnancy with one another. Apparently conflicting statutes should be harmonized and each given effect so far as possible, and where two statutes can be given a construction to uphold both, such construction must be given them. * * * "

(Also see *State ex rel. Wells v. Walker*, 34 S.W. (2d) 124, 326 Mo. 1233).

Applying the foregoing rules of statutory construction we are of the opinion that section 13829, supra, was not repealed by the enactment of the County Budget Act, it certainly was not specifically repealed, and the law does not favor the repeal of any statute by implication. There is no conflict between the Budget Act and Section 13829, supra. Certainly there should be some authority for the county court to transfer any unexpended balance for some lawful county purpose after all the provisions under the Budget Act have been fully met, and Section 13829, supra, serves that purpose.

You inquire if the county court may transfer any surplus to the road and bridge fund and the building fund after all warrants for the years 1942 and 1943 have been paid. We are assuming, of course, that not only the warrants for 1942 and 1943 have been paid but also all outstanding legal warrants for prior years. In such case we are of the opinion that the county court may transfer any surplus to the road and bridge fund and the building fund, if in their judgment, such unexpended balance is needed in said funds. Section 8526, R. S. Mo. 1939, authorizes the county court to make a levy for county road and bridge fund. Also Section 13760, R.S. Mo. 1939, creates a county building fund.

CONCLUSION

It is, therefore, the opinion of this department that the county court is authorized, under Section 13829, R. S. Mo. 1939, to transfer

Mr. J. T. Pinnell

-5-

November 8, 1945

any surplus in the County Treasury from revenue collected for the years 1942 and 1943, to the road and bridge fund and the building fund of the county, providing all warrants for 1942 and 1943 and prior years thereto have been paid.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

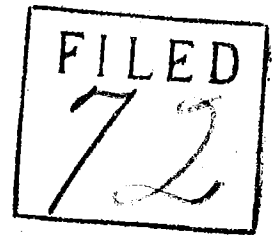
APPROVED:

J. E. TAYLOR
Attorney General

ARH:mw

OFFICIAL BONDS: Bond of County Collector of the Revenue.

January 22, 1945



Honorable Ray R. Pryer
Prosecuting Attorney
Clinton, Missouri

Dear Sir:

Reference is made to your letter of January 17, 1945, requesting an opinion of this office, in the following words:

"I would like to have your office express an opinion on the scope and amount of bond required of Collectors, setting out specific funds requiring separate bonds, etc. - this all at the request of the County Court."

In the absence of definite information relating specifically to Henry County with respect to population, nature of organization, total collections, etc., we are not in a position to give you a definite opinion.

However, the following comments on the statutes mentioned in your letter may be of some assistance.

The only official bond required of the collector of revenue is provided for by Section 11056, R. S. Missouri, 1939, as amended, Laws of Missouri, 1943, page 1063. The pertinent portion of such section reads as follows:

"Every collector of the revenue in the various counties in this state, * * * shall give bond and security to the state, to the satisfaction of the county courts, * * * in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount:

Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. * * *

This statute further provides that in counties of less than eighty-five thousand inhabitants (see Laws of Missouri, 1943, page 1063), the county court may, by order of record, require daily deposits of collections in the county depository. In that event the total penalty of the bond may be fixed at a sum equal to the largest collections made during any calendar week of the year preceding the appointment of the collector, plus ten per cent of said amount.

Sections 11062, 11063 and 11064, R. S. Missouri, 1939, provide for the examination of the bond by the county court, the authority to require a new bond, and further provide for a vacancy in office for failure of the collector to provide such new bond.

Section 11067, R. S. Missouri, 1939, empowers the collector to appoint deputies, and authorizes him to require bonds from such deputies to protect himself. These bonds run to the collector, and the county court has no official connection therewith, as the primary responsibility for the collection of the moneys remains with the collector.

Section 12342, R. S. Missouri, 1939, provides for the posting of a bond with the board of supervisors of any drainage district organized under the provisions of Article 1, Chapter 79, R. S. Missouri, 1939. This bond runs to the board of supervisors, and again is one with which the county court has no official connection.

Section 13911, R. S. Missouri, 1939, applies only to counties containing a city having a population of not less than fifty-five thousand inhabitants nor exceeding one hundred fifty thousand inhabitants, and with taxable

Honorable Ray R. Pryer

-3-

January 22, 1945

wealth of over fifty million dollars. Its provisions are not applicable to Henry County.

CONCLUSION

In the premises, we cannot render an opinion on the general questions submitted. The amount of the bond in each case must necessarily be determined by the county court in accordance with the quoted provisions of Section 11056, R. S. Missouri, 1939. However, as questions of a specific nature present themselves, we should be glad to give your office an opinion upon submission of the facts.

We trust the above outline will be of some assistance to you and your county court.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

WFB:HR

OFFICIAL BONDS: County Treasurer not required to furnish official bond for school moneys in counties under township organization, as in such counties respective township trustees are custodians of school funds.

January 30, 1945



Honorable Ray R. Pryer
Prosecuting Attorney
Clinton, Missouri

Dear Sir:

Reference is made to your letter of January 26, 1945, requesting an opinion of this office, and reading, in part, as follows:

"In re: Bond Of Treasurer With Regards
To School Moneys: Sec. 10400,
R. S. 1939.

"For the benefit of the County Court I would like an official opinion on the matter above captioned.

"Henry County is under the Township Organization plan; has between 23,000 and 25,000 inhabitants; has now approximately \$40,000 in school moneys. These matters may, incidentally, have bearing on the matter, hence their inclusion in this communication."

Section 10400, R. S. Missouri, 1939, reads, in part, as follows:

"The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized in this chapter, except in counties having

Honorable Ray R. Pryer

-2-

January 30, 1945

adopted the township organization law,
in which counties the township trustee
shall be the custodian of all school
moneys belonging to the township, and be
subject to corresponding duties as the
county treasurer; * * * "

In view of your statement that Henry County is under township organization, we hold the exception contained in the quoted portion of the statute is applicable.

CONCLUSION

In the premises, we are of the opinion that the County Treasurer of Henry County is not required to supply the separate official bond as custodian of the school moneys, required by Section 10400, R. S. Missouri, 1939, for the reason that inasmuch as Henry County is operated under township organization, the trustees of the respective townships are, by the exception contained in such section, designated custodians of the school moneys accruing to their respective townships.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

WEB:HR

SPECIAL ROAD DISTRICTS: Right to receive tax moneys in hands of township treasurer arising from road and bridge levies on land located within jurisdiction of special road district organized under Art. 18, Chap. 46, R. S. Mo. 1939.

March 5, 1945



Honorable Ray R. Pryer
Prosecuting Attorney
Clinton, Missouri

Dear Sir:

Reference is made to your letter under date of February 17, 1945, reading as follows:

"A special road district was organized in Springfield Township, Henry County, Mo., in January 1945.

"This special district now is claiming a right to tax moneys collected by the Township Collector for the year of 1944, that is, to their pro-rata share of such moneys. They claim the right to road and bridge taxes collected against all lands lying in the newly organized special district. There is no dispute as to future collections, - merely tax moneys collected for the 1944 year.

"Under the law, a special district makes its own levies for revenue and does not benefit from the general moneys that come into the Township funds for road and bridge work. My theory is, that the special road district now having placed itself beyond the reach of Township funds and therefore not having had an opport to have made its own revenue producing levies, is entitled to the moneys derived in taxes by reason of

the Township levy as it applies to lands now within the boundaries of the special road district. Naturally, the Township Collector wishes an opinion on this matter before making disposition of the money in his hands."

On February 20, 1945, we wrote you for additional information on the following questions:

"(1) Has the township board of directors divided the township into road districts, wherein the newly created special road district has been incorporated, as provided by Section 8814, R. S. Mo. 1939?"

"(2) If so, are the boundaries of the new special road district coextensive with the boundaries of one or more of such road districts?"

"(3) Are any of such road districts created by the township board of directors, if any, operating under the contract system, as provided by Section 8826, R. S. Mo. 1939?"

We now have your response thereto, which reads as follows:

"Referring to your communication of Feb. 20, 1945, in which letter you ask concerning certain factual matters involved in the matter discussed, I will say: - the answer is 'no' to each of the questions (1), (2) and (3).

"The Special Road District was carved out of the Township mass without regards to any previous road districts and there are no involvements such as might arise under the Sections cited in your letter."

March 5, 1945

The right of the treasurer of the special road district to receive the tax moneys in the hands of the township treasurer standing to the credit of the road district, or districts, incorporated into the special road district is governed by a part of Section 8840, R. S. Mo. 1939, from which we quote:

" * * * The township boards shall also cause the township treasurer to pay over to the treasurer of the special road district all moneys in his hands belonging to the district or districts that have been merged into the special road district whenever the board of commissioners of such special road district shall make demand therefor. * * * "

We note from your answer of "no" to our inquiry (1), that the township board of directors had not prior to the organization of the special road district divided the township into road districts. In the circumstances, it may be difficult to ascertain the amount of money to be turned over to the special road district treasurer, in accordance with the above quoted portion of Section 8840, R. S. Mo. 1939, providing for such special road district to receive the money standing to the credit of the district, or districts, incorporated into the new special road district; however, the boundaries of the special road district have been definitely established, and it should not be impossible to determine the amount of road and bridge taxes arising from the land within that particular area.

With respect to the time the special road district is entitled to receive the money, we think the last clause of the quoted portion of Section 8840, R. S. Mo. 1939, is controlling. It definitely states that such transfer shall be made "whenever the board of commissioners of such special road district shall make demand therefor." As further indicative of the legislative intention that the newly organized special road district shall immediately enter into the performance of its duties, we call your attention to the further provision of the section mentioned:

March 5, 1945

"The township board of trustees shall, upon the organization of such commissioners, cause all tools and machinery * * * to be delivered to said commissioners. * * * "

To the same effect is the provision contained in Section 8837, R. S. Mo. 1939, relating to the incorporation of the newly organized special road district, reading as follows:

" * * * Whenever an order is so made incorporating a public road district, such district shall thereupon become * * * a political subdivision of the state * * * ."

Such intent is further disclosed by the provision in Section 8838, R. S. Mo. 1939, relating to the appointment of the commissioners for the special road district, reading as follows:

"At the term of court in which such order is made, * * * the court shall appoint three commissioners, * * * who shall hold their office until the first Tuesday after the first Monday in January thereafter; * * * ."

Reading the entire article, particularly the quoted portions set out above, indicates to us the intention of the Legislature that the newly organized special road district shall immediately enter into the discharge of its governmental duties, and the further intention to implement such district with the money and equipment to carry on such duties.

CONCLUSION

In the premises, we are of the opinion that the special road district described in your letter of inquiry is now en-

Honorable Ray R. Pryer

-5-

March 5, 1945

titled to the funds in the hands of the township treasurer arising from road and bridge taxes on lands lying within the boundaries of such special road district, upon proper demand therefor being made by the board of commissioners of such special road district.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

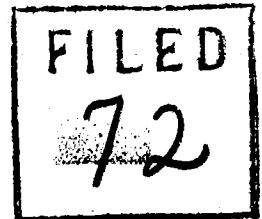
WFB:HR

ADMINISTRATOR, NATIONAL COUNCIL
OF DEFENSE:

Re: Disposition of papers and
reports to the Governor.

June 22, 1945

7/19
Mr. J. A. Potter, Administrator,
Missouri State Council of Defense
Central Trust Building
Jefferson City, Missouri



Dear Mr. Potter:

We are in receipt of your letter of June 14, 1945, reading as follows:

"The Missouri State Council of Defense will close its State office in Jefferson City permanently on June 30, 1945. A full and complete report of its operations from January 17, 1941 to December 31, 1944 was submitted to the Governor of Missouri in January, 1945.

"All bills have been paid and the small cash on hand will be returned to the State Treasurer, and I desire your opinion on the following questions:

"1. What disposition shall I make of our files of paid invoices and our record book of expenditures against our appropriations?

"2. What report, if any, financial or otherwise should be made by me when the office is closed on June 30, 1945?"

The authority for the creation of the State Council of Defense is contained in Section 15086.2, Laws 1941, p. 669, which section reads as follows:

"The Governor is hereby authorized and

June 22, 1945

empowered in time of emergency or public need in the Nation or the State to create by proclamation a State Council of Defense, herein-after designated as the 'Council,' for the general purpose of assisting in the coordination of the State and local activities related to National and State defense. Whenever he deems it expedient, the Governor may, by proclamation, dissolve or suspend such Council or reestablish it after any such dissolution or suspension."

The section which further provides for the "Council" is Section 15086.3, Laws 1941, page 669, which section reads as follows:

"(a) The Council shall consist of not less than fifteen members appointed by and holding office during the pleasure of the Governor. The Governor shall serve as chairman of the Council. He shall designate one of the members of the Council as vice-chairman. Appointment of members shall be made without reference to political affiliation and with reference to their special knowledge of industry, agriculture consumer protection, labor, education, health, welfare, or other subjects relating to National or State defense."

These are the only statutory provisions relating to the Council. They do not make provisions for disposition of records or files. The members of the Council are not required by the act creating the Council to file any records with any state department or officer. Ordinarily, vouchers for disbursements of public moneys are filed in the office of the State Auditor. If your papers were of the type usually kept by the State Auditor we think the placing of them with the State Auditor would be the proper disposition to make of them at this time. However, your first question relates to the disposition of paid invoices and

June 22, 1945

the record book of expenditures against appropriations. These do not fall within the type of papers kept by the office of the State Auditor and the statute does not provide for their disposition.

The statute quoted above places the authority of empowering and dissolving the State Council of Defense in the Governor of the State. All of the provisions of the statute point to the Governor as the agent controlling the activities of the Council and he is made responsible therefor.

Section 3631 R. S. Mo., 1939 provides as follows:

"If any private person shall have or obtain possession of any books, records or papers, appertaining to any public office, he shall deliver them to the officer entitled to the same."

We have found no general law in Missouri or in any other jurisdiction which would be of aid in determining the disposition of the records under consideration. However, under Section 3631 quoted above, private persons are to deliver records pertaining to public offices to the officer entitled to the same. Since the Governor is the officer mentioned in the statute as having control of the Council, and, more important, since he can reestablish the Defense Council and might desire to have the records transferred to it or such reestablishment, we think it is reasonable to say that he is the officer entitled to the records under Section 3631, R. S. Mo., 1939.

Section 12995, R. S. Mo. 1939, is as follows:

"He shall reside and keep his office at the seat of government; have the safe-keeping of the seal of state, and of all public records, rolls, documents, acts, resolutions and orders of the general assembly; keep a register of all commissions issued, the official acts of the governor, and, when necessary, attest the same."

Should the Governor not have adequate facilities for the safe-keeping of the records in question, we think, under the above section, that it would be proper for him to deposit them in the office of the Secretary of State.

Mr. J. A. Potter

-4-

June 22, 1945

CONCLUSION

It is, therefore, the opinion of this department that your paid invoices and record book of expenditures against appropriations should be sent to the Governor of Missouri, who may then deposit them in the office of the Secretary of State, if he so desires, and that any financial or other report which you might make should be made to the Governor of Missouri.

Respectfully submitted,

Smith N. Crowe

SMITH N. CROWE

Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SEN:rw

NEPOTISM: One is guilty of violation of nepotism section when relationship exists between father and son, even when the appointee is to receive compensation from sheriff.

September 26, 1945

FILED

72

10-2

Honorable Ray R. Pryer
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

Reference is made to your letter dated September 14, 1945, requesting an official opinion of this office and reading as follows:

"In the construction of Sec. 13, Article 14 (page 166c) of the old Constitution of Missouri it, apparently, would preclude a county officer, whether on a salary or a fee basis, from appointing a near relative to public office or employment.

"Under Sec. 6, Article 7 of the new Constitution a very similar provision is found.

"The decisions, so far as I have found, have interpreted this clause only with reference to salaried officials, and make no reference to officials paid entirely by fee from their office.

"The Sheriff of Henry County is paid entirely by fees resulting from the performance of the duties involved in the conduct of his office. Could he, legally, appoint his son to be a Deputy Sheriff to

serve under him? It being understood that the Deputy's remuneration will come entirely from the funds of the Sheriff."

The applicable provision of the Constitution of 1945, relating to your inquiry, is Section 6 of Article VII, which reads as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

Your inquiry resolves itself into two component parts:

1. Is a sheriff a public officer within the meaning of the term as used in the above constitutional provision?
2. Is the son related to the father within the prohibited degree, either by affinity or consanguinity?

In the determination of the first question, we have resorted to the following definition of "public officer," as found in State ex rel. Pickett v. Truman, 64 S.W. (2d) 105, 1.c. 106:

"In Mechem on Public Officers, pp. 1 and 2, Sec. 1, it is said: 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' We have approved this definition in State ex rel. Walker v. Bus, 135 Mo. 325, 331, 332, 36 S. W. 636, 35 L. R. A. 616, State ex rel. v. Hackmann, 300 Mo. 59, 254 S.W. 53, 55, and Hasting v. Jasper County, 514 Mo. 144, 232 S.W. 700, 701; * * * * *"

Applying this definition to the office of sheriff, we come to the conclusion that such officer is a public officer within the meaning of the term as used in the Constitution of 1945.

In consideration of the second question, we have resorted to the definition of "consanguinity," as found in Volume 8 of Words and Phrases, page 611, reading as follows:

"'Consanguinity' means the connection or relation of persons descended from the same stock or common ancestor, and is either lineal or collateral. Lineal is that which subsists between persons of whom one is descended in a direct line from the other. Collateral kindred descends from the same stock, but differ from the lineal in that they do not descend one from the other. State v. De Hart, 33 So. 605, 606, 109 La. 570."

"Affinity" is defined in Volume 2 of Words and Phrases, page 661, and reads as follows:

"'An affinity is the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related by "affinity" to all blood relatives of his wife, and the wife is related by "affinity" to all blood relatives of the husband.'
* * * * *"

With these definitions in mind it is apparent that no relationship exists between father and son by affinity, but that there is a relationship by consanguinity.

In your request you state that a sheriff who only receives compensation by fees intends to appoint his son as deputy. Under the applicable section of the Constitution of 1945, it is not necessary that the relative who is

September 26, 1945

appointed receive compensation in any manner. The section is violated by the appointment and not by the fact that he is to receive compensation.

Without going into lengthy discussion, I think it is apparent and obvious that the relationship between father and son is such as to fall within the prohibited degree stated in the Constitution of 1945.

Conclusion.

We are of the opinion that a sheriff is a public officer within the meaning of that term as used in Section 6 of Article VII of the Constitution of 1945; and that the son of such public officer is within the fourth degree relationship to such public officer, and cannot be appointed deputy sheriff without subjecting such officer to forfeiture of office. The fact that the sheriff is paid entirely by fees resulting from the performance of his duties, and that the deputy would be paid by the sheriff, does not alter the situation.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ML

COUNTY LITIGATION: Lawsuits of county may be compromised if they do not release or partially release established indebtedness, liability or obligation due state or county.

February 21, 1945

2/23
FILED
73

Honorable W. Oliver Rasch
Prosecuting Attorney
Festus, Missouri

Dear Mr. Rasch:

The Attorney General acknowledges receipt of your letter of January 30, 1945, in which you request an opinion as follows:

"Some time ago the county court of Jefferson County desired to change the location of a road in this county, because of a bad curve in the old road.

"Condemnation proceedings were instituted under Section 8486 R. S. Mo. 1939. Upon failure of the owner of the land to file claim for damages the transcript of the record and the original files were transmitted to the circuit clerk. Upon a hearing in the circuit court, the jury allowed the property owner \$60.00 in damages, which money and the costs of the proceedings were paid into court by the county. The circuit clerk is still holding the \$60.00 as there were two mortgages against the property and no claim has been made for the amount of damages allowed by the jury.

"The property owner has filed a suit in ejectment against the county. One of the contentions of the property owner is that Section 8486 is unconstitutional.

"Please advise if the county court has authority to compromise and settle the

suit in ejectment by paying the property owner an additional sum."

Before proceeding to a discussion of the question asked, it is thought advisable to call to your attention the case of State ex rel. Lashly vs. Wurdemann, 183 Mo. App. 28, in which it is held that the county court does not have control of the litigation of the county but is under the control of the prosecuting attorney, so that if it is possible to compromise the lawsuit mentioned by the payment of a sum of money to the plaintiff, it could only be done by the joint consent of the prosecuting attorney, as the officer who has control of the case, and the county court, which is the fiscal agent of the county.

The general rule regarding the compromise of lawsuits in which the county is a party, is that, where the necessary elements are present, suits are subject to compromise by the county court or board in the absence of fraud, bad faith, collusion or other vitiating elements. State ex rel. Campbell vs. Slavik, 14 N. W. (2d) 186, 1. c. 188; Weaver et al. vs. Hampton et al, 167 S. E. 484, 1. c. 485; Roberts v. Fiscal Court of McLean County, 51 S. W. (2d) 897; 20 C. J. S. page 1261, Sec. 303. And the Supreme Court of Missouri in one case has approved compromise of pending litigation in which the county was a party. The St. Louis, Iron Mt. & Southern Ry. Co. vs. Anthony, 73 Mo. 431. This case involved the collection of a tax upon which suit had been brought. Judgment had once been rendered and reversed by the Supreme Court, and while the case was pending, before a retrial, a compromise was made. The county collector ignored the compromise and undertook to collect the amount of the tax as shown by the tax books, upon the theory that no authority existed for the compromise and that it was void. The court in upholding the validity of the compromise used the following language (1. c. 434):

"It is now contended that the county had no authority to make the compromise in question, or any compromise whatever. We are not of that opinion. The power to sue implies the power to accept satisfaction of the demand sued for, whether the precise amount demanded or less. The taxes were levied for the benefit of the county. The beneficial interest was in the county, and it is for the public interest that she should have the right to settle, by compromise,

questionable demands which she may assert. Must the county prosecute doubtful claims at all hazards, regardless of costs and expenses, and is it for the public good that the right to settle such demands by compromise be denied her? As was said by the supreme court of New York in the case of the Board of Supervisors of Orleans Co. v. Bowen, 4 Lansing 31: 'It would be a most extraordinary doctrine to hold that because a county had become involved in a litigation, it must necessarily go through with it to the bitter end, and has no power to extricate itself by withdrawal or by agreement with its adversary.' The same doctrine was sanctioned in the Supervisors of Chango County v. Birdsall, 4 Wend. 453."

This is the only case in which an appellate court of Missouri has directly passed upon the question and if there are no constitutional or statutory provisions which would prohibit a compromise, then this case would furnish authority for the making of the compromise.

No statute has been found which would prohibit a compromise but Section 51 of Article IV of the Constitution of Missouri, might stand in the way. This section is as follows:

"The General Assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State, or to any county or other municipal corporation therein."

The Supreme Court of Missouri in the case of Graham Paper Co. vs. Gehner et al., 59 S. W. (2d) 49, in discussing this provision of the Constitution, used the following language (1. c. 52):

"* * * The language of this constitutional provision is very broad and

comprehensive in protecting the state against legislative acts impairing obligations due to it, in that it prohibits the release or extinguishment, in whole or in part, not only of indebtedness to the state, county, or municipality, but liabilities or obligations of every kind. * * *

The quoted passage refers to liabilities and obligations due the state. What is there said should be equally true with regard to liabilities and obligations due to the county. Then, while the constitutional provision prohibits the Legislature from passing any law releasing, in whole or in part, debts, liabilities or obligations due the state, counties or cities, it should follow that officers who receive their authority from the Legislature could not in the performance of their statutory duties do something which the Legislature could not authorize them to do.

The situation of the law seems to be that the Supreme Court has approved the compromise of a lawsuit by a county and the Constitution prohibits the release of any debt, liability or obligation due the county. We cannot ignore either the ruling of the Supreme Court or of the constitutional provision, but they must be read and construed together as both are rules of law applying to the question. It would follow that a compromise can be made of a lawsuit in which the county is a party, by the county, if the compromise does not release any definitely established indebtedness, liability or obligation due the county.

In connection with the above section of the Constitution, the following definitions of the words "liability" and "obligation" are cited:

"The obligation to convey land under a contract is a 'liability' of a corporation within Civ. Code, Sec. 309, as amended by St. 1917, p. 658, Sec. 2, exempting directors from liability for distribution of assets to stockholders where all debts and liabilities have been paid, though person other than party to such contract to whom land

is conveyed assumes obligation of the contract." Talcott Land Co. v. Hershiser, 195 P. 653, 656, 184 Cal. 748.

"The word 'liability,' as used in section 3, art. 8, of the Constitution, is to be read, construed, and accepted in the usual and ordinary sense in which that term is commonly employed, and, when so used, means and signifies the state of being bound or obligated in law or justice to do, pay, or make good something." Feil v. City of Coeur d'Alene, 129 P. 643, 649, 23 Idaho, 32, 43 L. R. A., N.S., 1095.

"A 'liability' in its broader sense means any obligation one is bound in law or justice to perform and is synonymous with 'responsibility.' Murphy v. Chicago League Ball Club, 221 Ill. App. 120, 126.

"The term 'obligation' includes any duty imposed by law." Helvering v. British-American Tobacco Co., C.C.A., 69 F. 2d 528, 530.

"An 'obligation' is ordinarily defined as that which a person is bound to do or forbear; any duty imposed by law, promise or contract, by the relations of society, or by courtesy, kindness, etc." Goodwin v. Freadrich, Neb., 280 N. W. 917, 923.

"The word 'obligation' is defined to be 'the constraining power or authoritative character of a duty, a moral precept, a civil law, or a promise or contract voluntarily made; that to which one is bound; that which one is obliged or bound to do, especially by moral or legal

Feb. 21, 1945

claims; a duty." Colter v. State,
39 S. W. 576, 577, 37 Tex. Cr. R.
284, quoting Cent. Dict.

Under the foregoing definitions and your statement of fact, there would be a definite liability or obligation upon the landowner and the land established by decree of a court of competent jurisdiction, which judgment cannot be attacked by a repeal or writ of error. While an attack is sought to be made upon this judgment by a separate suit in ejectment alleging unconstitutionality of the prescribed statutory procedure, we must consider the statute as constitutional until it is proven unconstitutional beyond a reasonable doubt.

Conclusion

Under the existing circumstances as stated in your letter, it is the opinion of this office that no compromise can be made of the ejectment suit at this time.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

WOJ:EG

COUNTY COURT:
PUBLICATION OF ANNUAL
STATEMENT:

County Court may not dispense with
publication of annual statement if
any newspaper in the county will
publish same for legal rate.

February 23, 1945

FILED

73

Mr. B. E. Ragland
Chief Clerk
State Auditor's Office
Jefferson City, Missouri

Dear Mr. Ragland:

On February 7, 1945, you requested the opinion of this Department upon the statement of Mr. Ellis, County Clerk of McDonald County, wherein Mr. Ellis stated that there were three newspapers published in that county; that the County Court sent out notices by registered mail that they would receive sealed bids for publishing the annual financial statement of the County Court for 1944, and that the County Court received no bids. Mr. Ellis then inquired of you if the County Court could dispense with publishing the annual statement in newspapers and post ten copies of such statement. Later, the County Clerk informed you that "as for offering them the legal rate they have not made a bid for the work in fact say they do not want it."

As the statement of the County Clerk is somewhat indefinite the writer today talked to the publisher of one of the newspapers at Pineville, the county seat of McDonald County, and he stated that his newspaper will publish the financial statement of the county, as will one other newspaper in the county, if allowed the legal rate for such publication; but that, due to the scarcity of material and help, the newspapers will not do it for less than the legal rate and were, therefore, not interested in bidding upon the work.

Section 13827, R. S. Mo. 1939, which requires the publication of a detailed financial statement of the county each year, provides, among other things, the following:

February 23, 1945

"On or before the first Monday in March of each year after the taking effect of this law the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county, if such there be, and if not by notices posted in at least ten places in such county, a detailed financial statement of the county for the year ending December 31, preceding. * * *"

Apparently, the newspapers of McDonald County do not refuse to publish the annual statement, but, if our information is correct, will in fact publish it if allowed the legal rate of publication. If this be true, then the County Court cannot be justified in dispensing with the publication and attempt to comply with the statute by posting notices. The above quoted portion of the statute expressly requires the notice to be published in a newspaper in the county, if such there be, and, if not, then by notices posted in at least ten public places in the county. Apparently conditions do not exist under which the County Court may post notices and dispense with publication in a newspaper.

CONCLUSION

In the opinion of this Department, if a newspaper of the county will publish the required annual financial statement of the county if allowed the legal rate for such publication, the County Court cannot be justified in dispensing with such publication.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney General

APPROVED:

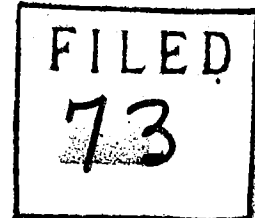
HARRY H. KAY
(Acting) Attorney General

VCT:CP

COUNTY BUDGETS: May be revised but no authority granted county court to donate county funds to city.

June 25, 1945

6/26



Honorable B. E. Ragland
Chief Clerk
Office of the State Auditor
Jefferson City, Missouri

Dear Mr. Ragland:

Under date of June 20, 1945, you wrote the Attorney General enclosing a letter from Honorable John A. Mooney, Clerk of the County Court of Phelps County, which letter is as follows:

"As you have probably been informed through the press and radio, the little city of Newburg in this County was almost wiped out of existence by a flood Friday, June 8. The houses in the flood area are filled with mud and washed from the foundations, the water works and sewage system disrupted and the streets torn up and filled with debris that is going to cause a health hazard unless more help is obtained to clear them.

"Now the County Court wants to revise the budget and donate \$2,000.00 to the city if it can be done legally. Will you please advise us in regard to the legality of such donation and as to whether or not the revised budget will meet with your approval?"

And you made the following request for an opinion concerning the letter:

"We are enclosing herewith a letter from John A. Mooney, county clerk Phelps County.

"We request an official opinion on the questions set out in Mr. Mooney's letter. We would appreciate an early reply to this request."

The letter of Mr. Mooney contains three questions. These questions are:

1. May the County Court at this time revise its budget for the year 1945 adopted at the February Term of Court?
2. May the County Court legally donate \$2000.00 to the City of Newburg?
3. If the County Court has authority to revise the budget and make this gift will the State Auditor approve such action?

The first two questions are of such a general nature that it is impossible to give a specific answer to them and there can only be a discussion of the County Court in regard to these matters. The third question is directed specifically to the State Auditor and involves the question of the authority of the State Auditor to act, and, if he has such authority, as to the exercise of his discretion in approving or rejecting such changes. Only the first portion of this question can be discussed, for, if the State Auditor has such authority, it would be highly presumptuous for this office to undertake to direct the State Auditor in the exercise of his discretion.

The County Budget Law is a law of comparatively recent origin, as it was first enacted in 1933, Laws of Missouri 1933, page 340 et seq. Slight amendments have been made to it since its enactment. The County Budget Law is now found in Article 2, Chapter 73, R. S. Mo. 1939, and the last amendment to the Act is shown at page 650, Laws 1941. This amendment is not involved in the discussion of the questions here under consideration and for that reason in citing and referring to the Law the citations will be to the 1939 Revision of the Statutes.

By the provisions of Section 10910, R. S. Mo. 1939, which was originally Section 1 of the County Budget Act, the first eight sections of the Act apply to counties having a population of fifty thousand inhabitants or less by the last decennial census. The population of Phelps County by the 1940 census was 17,437, and therefore only the first eight sections of the Act are the ones we must consider.

In addition to the provision of Section 10910 heretofore mentioned, this section also defines terms, and places the duty of preparing the budget on the county court. It further requires the court to place the budget of record, and file copies with the county treasurer and the state auditor, this to be done at the February Term. At this point it is considered advisable to call attention to the last sentence of this section, as follows:

"The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

Section 10911, R. S. Mo. 1939, requires the court to classify proposed expenditures into six classes. Briefly, these classes are: (1) support of insane pauper patients in state hospitals; (2) cost of holding circuit court and elections; (3) upkeep, repair and construction of roads and bridges; (4) salaries and office expense of county officers (not including furniture and office machines); (5) contingent and emergency expense; and (6) balance may be expended for any lawful purpose. By the terms of Class 5 the county court is specifically authorized to transfer any surplus from Classes 1, 2, 3 and 4 to Class 5.

Section 10912 places the duty on officers claiming salary or supplies to furnish an itemized estimate of the amount required before January 15th of each year, and Section 10913 places certain duties on the county clerk.

Section 10914 requires the county court to show the estimated expenditures for the year by classes, the classes being the same as those mentioned in Section 10911, and the same provision is found under Class 5 for transferring any surplus from Classes 1, 2, 3 and 4 to Class 5. From the language of Class 6 we quote the following:

"* * * Provided however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of

such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

Section 10915 further treats of the duties of the officers of the county in submitting their estimates, and Section 10916 prescribes forms to be used in making the submission of estimates.

Section 10917, the last section applicable to our questions, is as follows:

"It is hereby made the first duty of the county court at its regular February term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein. After the county court shall have revised the estimate it shall be the duty of the clerk of said court forthwith to enter such revised estimate on the record of the said court and the court shall forthwith enter thereon its approval. The county clerk shall within five days after the date of approval of such budget estimate, file a certified copy thereof with the county treasurer, taking his receipt therefor, and he shall also forward a certified copy thereof to the state auditor by registered mail. The county treasurer shall not pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed. (This shall not

June 25, 1945

apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand.) If any county treasurer shall pay or enter for protest any warrant before the budget estimate shall have been filed, as by this act provided, he shall be liable on his official bond for such act. Immediately upon receipt of the estimated budget the state auditor shall send to the county clerk his receipt therefor by registered mail.

"Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this law shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

The County Budget Law has been several times before the Appellate Courts for interpretation and application, and the Supreme Court has declared the purpose of the Act. This declaration of purpose is found first in the case of Traub v. Buchanan County, 341 Mo. 727, 1. c. 731, and later in the case of Gill v. Buchanan County, 142 S. W. (2d) 665, 1. c. 668. From these two cases the following brief quotations are taken respectively:

"No power possessed by the county court was thereby curtailed. The budget officer simply determines whether sufficient money is provided with which to pay the obligation intended to be incurred by any contract or order presented to him for endorsement. This is a mere matter of bookkeeping. If the cash is on hand or has been provided for, it is the duty of the auditor or budget officer to make such endorsement. Prior to the enactment of the budget law a county court had no right to incur obligations in any one year in excess of the revenue provided for that year. By the enactment of the Budget law the Legislature has merely

provided ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income. The power of the County Court not having been curtailed by the enactment of the budget law, the point made by respondent is without merit and is ruled against him."

"This Court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the Constitutional provisions of Section 12, art. 10' by providing 'ways and means for the county to record the obligations incurred and thereby enable it to keep the expenditures within the income.'" (Citing the Traub case.)

The county court has the duty of managing the financial affairs of the county. Section 7, Article VI of the Constitution of 1945. And under the Constitution of 1875, Section 36, Article VI. Also, Section 2480, R. S. Mo. 1939, which is here quoted as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

And there are many other statutes not here set out.

In the management of the county business, the county court has such powers as are expressly conferred on it and such implied powers as are necessary to carry out the powers expressly granted. King v. Maries County, 297 Mo. 438.

Under the County Budget Law it is mandatory that sufficient funds be budgeted under the first four classes to meet the demands on these classes but if there should exist a surplus then this surplus can be transferred to Class 5. Here is authority for one revision of the county budget. Also warrants may be issued against Class 6 to pay claims against prior classes, which, in effect, is a revision of the budget authorized by statute.

These are the only two instances in the budget law where a revision is specifically authorized. However, the budget law does not curtail the powers of the county court and if the court in making its budget has not budgeted all of its anticipated revenue for expenditure and the county has funds unappropriated, then it is considered possible that it might be authorized to amend the budget for the purpose of expending a portion or all of this unappropriated balance.

This brings us to a discussion of the second question, "May the county court legally donate \$2000.00 to the City of Newburg?"

While the county court is the business agent of the county it can only disburse the funds of the county for public purposes. County Farm Bureau v. Jasper County, 315 Mo. 560; State ex rel. v. Chariton Drainage Dist., 252 Mo. 345. The revenue of the county is not to be regarded and treated in the same manner as the revenue of a private person or corporation. The county being a public corporation existing only for public purposes connected with the administration of state government, its revenue is subject to the control of the Legislature. C. J. S., Vol. 20, page 1106.

The Legislature of Missouri has authorized the expenditure of county funds for many purposes but a careful search of the statutes fails to reveal any authority granted to the county courts to appropriate funds of the counties to be used by cities in the manner indicated in the letter of Mr. Mooney.

As we find no authority for making any such grant of county funds to a city, no necessity exists for discussing the amount.

In regard to the third question, as no law is found authorizing such a grant it is not considered necessary to discuss the authority, if any, of the State Auditor to approve or disapprove any such action by the county court of Phelps County

June 25, 1945

as is indicated in the letter of Mr. Mooney.

Conclusion

Under some circumstances revisions may be made in county budgets. Further, no authority exists under which the county court may make a donation or grant for the purpose of repairing the waterworks or sewage system of a city when such waterworks or sewage system has been damaged by storm.

Respectfully submitted,

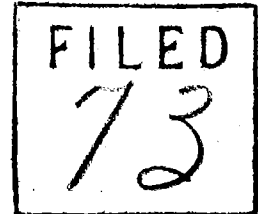
W. O. JACKSON
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

WOJ:EG

MOTOR VEHICLE: Under the facts stated the truck in question is a commercial motor vehicle.



July 18, 1945

Honorable W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Festus, Missouri

Dear Sir:

We are in receipt of your letter of June 30, 1945, requesting an official opinion from this department, which reads:

"Haversticks at DeSoto are engaged in the Well Drilling business. They have a truck on which is mounted Well Drilling equipment. The gross weight of this truck with the Well Drilling equipment mounted is 22,140 lbs. In a years time it travels approximately 200 miles over the highways of this state, some of the trips being more than 25 miles in length.

"In determining the annual license fee, should this truck be classified as a motor vehicle other than commercial vehicles or as a commercial motor vehicle? If it is classified as a commercial vehicle will the fee be for a local or beyond local commercial vehicle?"

From the facts stated in your letter it is apparent that the truck in question is used solely for carrying the well drilling equipment belonging to the owner and used in his business and that same is mounted upon the truck.

Section 8367, R. S. Mo. 1939, defines "commercial motor

July 18, 1945

vehicle" and "motor vehicle" for purpose of Article 1, Chapter 45, Regulations and License Fees, as follows:

"Wherever in this article, or in any proceeding under this article, the following words or terms are used, they shall be deemed and taken to have the meanings ascribed to them as follows: * * * * 'Commercial motor vehicle.' A motor vehicle designed or regularly used for carrying (a) freight and merchandise, or (b) more than eight passengers. * * * * 'Motor vehicle.' Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors. * * * * "

In view of the foregoing definitions we are of the opinion that the truck in question comes within the definition of a "commercial motor vehicle," since it is at least designed for carrying freight.

Section 8369, Laws 1943, pages 664, 665 and 666, provides for the registration of owners and fees required for commercial motor vehicles and motor vehicles, both local and beyond local, and reads in part:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the Commissioner, an application for registration on a blank to be furnished by the Commissioner for that purpose, containing: (1) a brief description of the motor vehicle to be registered, including the name of the manufacturer, the motor number and character, and amount of motive power, stated in figures of horsepower; (2) the name, residence and business address of the owner of such motor vehicle; (3) if said motor vehicle be a commercial vehicle the weight of the vehicle and the desired load in pounds;

July 18, 1945

(4) if such motor vehicle be a specially constructed or reconstructed motor vehicle, the application shall so state and the owner shall furnish the Commissioner such additional information as he shall require.

* * * * *

"Registration fees made payable to the State Treasurer shall be remitted to the Commissioner with the application for registration for the remainder of the calendar year on the basis of the license fees now provided by Section 8369 and Section 8370, Revised Statutes of Missouri, 1939; the license fees provided by this Act shall become effective on and after January 1, 1944.

"For motor vehicles other than commercial motor vehicles and motorcycles and motortricycles:

| | |
|---|---------|
| Less than 12 horsepower | \$ 5.00 |
| 12 horsepower and less than 24 horsepower | 8.50 |
| 24 horsepower and less than 36 horsepower | 11.00 |
| 36 horsepower and less than 48 horsepower | 20.00 |
| 48 horsepower and less than 60 horsepower | 25.00 |
| 60 horsepower and less than 72 horsepower | 31.50 |
| 72 horsepower and more | 37.50 |
| Motorcycles | 6.00 |
| Motortricycles | 7.50 |

"For commercial motor vehicles having a gross weight of:

| | |
|--|---------|
| Under 1,500 pounds | \$10.00 |
| 1,500 pounds to 10,000 pounds | 15.00 |
| 10,000 pounds to 12,000 pounds | 20.00 |
| 12,000 pounds to 18,000 pounds | 30.00 |
| 18,000 pounds to 20,000 pounds | 40.00 |
| 20,000 pounds to 22,000 pounds | 50.00 |
| 22,000 pounds to 28,000 pounds | 65.00 |

| | |
|----------------------------------|----------|
| 28,000 pounds to 32,000 pounds . | \$100.00 |
| 32,000 pounds to 38,000 pounds . | 125.00 |
| 38,000 pounds to 42,000 pounds . | 150.00 |
| 42,000 pounds to 44,000 pounds . | 175.00 |
| Over 44,000 pounds | 200.00 |

* * * * *

"For each local commercial motor vehicle there shall be paid a fee equal to one-third of the fee specified above for other commercial motor vehicles, provided, however, no vehicle fee shall be less than \$10.00.

"The term 'local commercial motor vehicle' includes every 'commercial motor vehicle' as defined in Section 8367, Revised Statutes of Missouri, 1939, while operating within this state and used for the transportation of persons or property:

"1. Wholly within any municipality or urban community, or

"2. Wholly within any municipality or urban community and a zone extending 25 air miles from the boundaries of any municipality or urban community, or contiguous municipality or urban community, or

"(3) In making hauls not exceeding 25 miles in length, or

"(4) When controlled or operated by any person or persons principally engaged in farming when used exclusively in the transportation of agricultural products or live stock to or from a farm or farms, or in the transportation of supplies to or from a farm or farms.

"Each commercial vehicle shall prominently display in a conspicuous place on said vehicle the name of the owner thereof, the address from which such motor vehicle is operated and the weight for which said motor vehicle is licensed;

July 18, 1945

provided further, that local commercial vehicles, in addition to the above information, shall prominently display on such vehicles in a conspicuous place the word 'Local'."

Unquestionably this truck could not come within the foregoing provision of Section 8369, supra, as a local commercial vehicle, for the reason it is occasionally used for a greater distance than 25 miles. Furthermore, it is not used by a person principally engaged in farming and used exclusively for transportation of agricultural products or live stock to or from a farm, or transportation of supplies to or from a farm.

Section 8370, Laws 1943, page 666, provides that the fees of a commercial motor vehicle shall be based upon the gross weight of the vehicle or any combination of vehicles and the maximum load to be carried at any one time. Said section reads in part:

"In determining fees based on the horsepower of vehicles propelled by internal combustion engines, said horsepower shall be computed and recorded upon the following formula established by the National Automobile Chamber of Commerce.

* * * * *

"Fees of commercial motor vehicles shall be based on the gross weight of the vehicle or any combination of vehicles and the maximum load to be carried at any one time during the licensed period."

Therefore, it is the opinion of this department that, in view of the foregoing statutory definitions, the truck in question is a commercial motor vehicle and is not a local commercial vehicle, as defined in Section 8369; supra. The license fee required for a commercial motor vehicle, not local and weighing 22,140 pounds with equipment, is \$65.00.

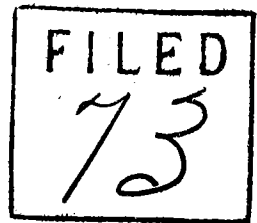
Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General
ARH:ML

COUNTY COURT: Not authorized to employ Abstracter to assist Assessor in making Assessor's Book.



August 8, 1945

8/13

Honorable W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Festus, Missouri

Dear Mr. Rasch:

Under date of July 17, 1945, you requested the Attorney General to furnish an opinion upon the following question:

"The County Court of this county desires to employ an Abstracter to revise the tax books of this county. He would compare his Abstract Books with those of the Assessor, would add any omitted real estate, correct and make proper legal descriptions and, if same is not assessed in the name of the present record owner, list it in his name. The County Court proposes to pay the Abstracter 20¢ a name for this service.

"Please advise if the County Court has authority to enter into a contract with an Abstracter to have this work done, assuming it is included in the budget."

The tax books are prepared by the County Clerk from the Assessor's Book. Section 11048, R. S. Mo. 1939. The Assessor is required to prepare the Assessor's Book. Section 10969, R. S. Mo. 1939, which reads as follows:

"The assessor, on examination and comparison of the list of property delivered by individuals, and the list of lands furnished by the secretary of state, and said maps and plats, and after diligent efforts for ascertaining all taxable property in his county, shall make a complete list of all the taxable property in his county, to be called the assessor's book."

By reading this section it appears the material to be used in making the assessor's book is taken from the assessment lists furnished the Assessor in accordance with the provisions of Section 10950, R. S. Mo. 1939, which reads as follows:

"The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property and real estate in his county, town or district, and assess the value thereof, in the manner following to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property,

in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor. Such lists shall contain: first, a list of all the real estate and its value, to be listed and assessed on the first of June, 1937, and every year thereafter, anything in this or any other section to the contrary notwithstanding; second, a list of all the livestock, showing the number of horses, mares, and geldings, and their value; the number of asses and jennets, and their value; and the number of mules and their value; the number of neat cattle, and their value; the number of sheep, and their value; the number of hogs and their value and all other live stock and its value; third, an aggregate statement of all the farm machinery and implements, and their value; fourth, a statement of household property, including the number of pianos and other musical instruments, clocks, watches, chains and appendages, sewing machines, gold and silver plates, jewelry, household and kitchen furniture, and the value thereof; fifth, money on hand; sixth, money deposited in any bank, or other safe place; seventh, an aggregate statement of solvent notes unsecured by mortgage or deed of trust; eighth, an aggregate statement of all solvent notes secured by mortgage or deed of trust; ninth, an aggregate statement of all solvent bonds, whether state, county, town, city, township, incorporated or unincorporated companies; tenth, the number of bee colonies and their value; ten and one-half, all motor vehicles and their value; eleventh, all other property not above enumerated (except merchandise, bills and accounts receivable, and other credits of a merchant

August 8, 1945

or manufacturer, arising out of the sale of goods, wares and merchandise, which have been returned for taxation, under sections 11309 and 11339, R. S. 1939), and its value; under this head shall be included all shares of stock or interest held in steamboats, keelboats, wharfboats, and other vessels; all toll bridges, all printing presses, type and machinery therewith connected, and all portable mills of every description, and all vehicles used in the transportation of persons (except of railway carriages), and all paintings and statuary, and every other species of property not exempt by law from taxation. The word 'list' as used in Section 10996 of this Chapter shall include all the lists required under this section to be taken."

And, lists made by the Assessor in accordance with the provisions of Section 10954, R. S. Mo. 1939, which reads as follows:

"Whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

The lists of lands furnished by the Secretary of State are also to be used, and the Assessor has free access to the maps and plats provided in accordance with Section 10966, R. S. Mo. 1939.

From the foregoing it is apparent that the duty is placed upon the Assessor to make the Assessor's Book and for this work compensation is authorized by Section 10996, R. S. Mo. 1939, which reads as follows:

"The compensation of each assessor shall be thirty-five cents per list in counties having a population not exceeding forty thousand, thirty cents per list in counties having a population of more than forty thousand, and not exceeding seventy thousand, and twenty-five cents per list in counties having a population in excess of seventy thousand inhabitants, and shall be allowed a fee of three cents per entry for making real estate and personal assessment books, all the real estate and personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other half out of the state treasury: Provided, that nothing contained in this section shall be so construed as to allow any pay per name for the name set opposite each tract of land assessed in the numerical list: Provided further, that in the city of St. Louis the assessor shall perform the duties now performed by the county clerk in extending taxes on the assessment books and such other services pertaining thereto as may be required by law, and shall be allowed the same compensation as is allowed by law to county clerks for such services; and provided also, that in all counties of this state having more than one hundred and fifty thousand and less than three hundred thousand inhabitants except in such counties as the assessor may now or hereafter be paid an annual salary in lieu of such fees, the compensation of the assessor shall be twenty-five cents per list together with such other fees as may be authorized by law."

August 8, 1945

With the facilities available to the Assessor mistakes may be reduced to a minimum. And, while it might be of some assistance to the Assessor to have an Abstracter make a comparison of the Abstracter's books with the Assessor's book, no statute has been found which authorizes the County Court to expend the funds of the county in that manner.

At this point it is pertinent to call attention to a brief quotation from the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, 1. c. 860:

"County courts are courts of record, created and given jurisdiction to transact all county business, and to audit and settle all demands against the county. Article 6, Section 36, Constitution of Missouri, Mo. St. Ann.; Sec. 2078, R. S. Mo. 1929, Mo. St. Ann., Sec. 2078, p. 2658. The above statute providing for settling and auditing claims against the county applied only to lawful demands and does not authorize the county court to audit and settle claims arising on void contracts. * * * * *

CONCLUSION

It is, therefore, the opinion of the Attorney General that the County Court of Jefferson County may not employ an Abstracter to revise the Assessor's book, and pay such Abstracter twenty cents per name for such service.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WOJ:CP

21 Smith
- TAXATION AND REVENUE:

Construction of Art. X, Sec. 13, Constitution of 1945 with respect to publication of notice of sale of real property for delinquent tax in the year 1945.

FILED
73

October 19, 1945
10/31

Honorable W. Oliver Rasch
Prosecuting Attorney
Festus, Missouri

Dear Sir:

Reference is made to your letter of October 16, 1945, requesting an official opinion of this office, and reading as follows:

"The County Court of this County has requested that I obtain your opinion in regard to the printing and publishing of lists of delinquent lands.

"The Collector of this County has caused such list of delinquent lands to be published in accordance with provisions of Section 11126 R. S. Mo. 1939.

"Is such a publication or notice sufficient or is it necessary that the publication or notice also meet the requirements of Article X, Section 13 of the New Constitution?"

Section 11126, R. S. Mo. 1939, which you have referred to in your letter of inquiry, reads, in part, as follows:

" * * * And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in

October 19, 1945

forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.: Provided, however, that if a part or parts of any forty-acre tract or other legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof, then, as to such land or lots, such list shall be so prepared and separated. * * *

In addition to the above statute, we further direct your attention to the following portion of Section 11125, R. S. Mo. 1939, reading as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale: * * *"

Article X, Section 13, of the Constitution of 1945 provides as follows:

"No real property shall be sold for state, county or city taxes without judicial proceedings, unless the notice of sale shall contain the names of all record owners thereof, or the names of all owners appearing on the land tax book, and all other information required by law."

Examination of the portions of Sections 11126 and 11125, R. S. Mo. 1939, quoted supra, and Article X, Section 13, of the Constitution of 1945, also quoted supra, discloses that, under the applicable constitutional provisions, in the future, absent

October 19, 1945

judicial proceedings, the notice of sale must contain the names of all record owners of the real property sought to be sold, or the names of all owners appearing on the land tax book, and that such is not required under the existing statutes. It is apparent that the statutory provisions are inconsistent with the constitutional provisions mentioned.

In the premises, we direct your attention to Section 2 of the Schedule appended to the Constitution of 1945, which reads, in part, as follows:

"* * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Inspection of the record of laws enacted by the current session of the General Assembly discloses that at this time no repeal or amendment of Sections 11126 and 11125, R. S. Mo. 1939, has been effected. Such being the case, the provisions of such Sections 11126 and 11125 will be kept in effect, under the quoted provision of Section 2 of the Schedule appended to the Constitution, for the period of time provided therein, and publications conformable thereto will be valid.

CONCLUSION

In the premises, we are of the opinion that publication of notice of sale of real property for delinquent state, county, and city taxes will be valid in the year 1945 if such publication conforms to the requirements of Sections 11126 and 11125, R. S. Mo. 1939, and that the provisions of Article X, Section 13, of the Constitution of 1945 are inapplicable to such publications made in the year 1945.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.
Assistant Attorney General

J. E. TAYLOR
Attorney General

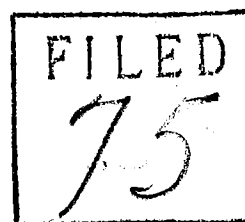
WFB:HR

STATE DEPARTMENT OF
RESOURCES & DEVELOPMENT:

Department does not have sufficient
statutory authority to enable it to
act in the capacity of an Airport
Agency within the meaning of H. R.
5024.

March 14, 1945

3-17



Mr. Frank Ridgway
State Department of Resources and Development
State Office Building
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion of recent date,
the pertinent part of which request reads as follows:

"In conjunction with the introduction
of Randolph Bill #5024 to the Commission
at the next meeting, I am wondering if it
would not be a good idea to get a ruling
from the Attorney-General on the authority
in House Bill #502 for the Commission to
act as the State Airport Agency towards
administering the affairs of H. R. #5024."

At the outset we shall endeavor to make some obser-
vations relative to Article XI, Laws of Missouri, 1943,
page 978. (See also Mo. Sta. Ann.)

Section 15393.1 reads as follows:

"There is hereby created a department of
the State of Missouri to be known as the
State Department of Resources and Develop-
ment, which may hereafter be referred to
as the department, and which shall be
created for the general purpose of advancing
the economic welfare of the people through
programs and activities to develop in a
proper manner the state's natural resources
and industrial opportunities pertaining to
commerce, agriculture, mining, forestry,
transportation, recreation, aviation and
other matters intended to foster and
develop gainful employment and the pursuit
of happiness of all who now are or who may
hereafter be residents of this state."

It will be noted from the reading of the above section
that the general purpose of the creation of the department
was for "advancing the economic welfare of the people
through programs and activities * * * and develop gainful

employment and the pursuit of happiness of all who now are or who may hereafter be residents of this state."

The duties of the Commission are set forth in Section 15393.7 and without encumbering this opinion by copying the entire eight paragraphs, we wish to point out that the following paragraphs begin as follows:

Paragraph (a): "Investigate, assemble, develop and study * * * the industrial opportunities and possibilities of the State of Missouri * * * ."

Paragraph (b): "Formulate and adopt a plan or plans * * * ."

Paragraph (c): "Encourage the location of new industrial enterprises in the state * * * ."

Paragraph (d): "Investigate, * * * * markets for Missouri products, * * * ."

Paragraph (e): "Encourage the development of recreational areas in the state, * * * ."

Paragraph (f): "Encourage the formation of local and sectional development committees * * * * to encourage the location of industries * * * ."

We quote Paragraph (g) in full as it is pertinent to the request made in your letter:

"Encourage the development of the aeronautical resources of the state and aid in an educational program related to aviation."

We also quote Paragraph (h) in full:

"Do such other and further related acts as shall, in the judgment of the commission, be necessary and proper to carry out the purposes for which the commission is created."

March 14, 1945

We have, in a meager way, set forth some of the language contained in the several duties in sub-division 7 of Section 15393, supra, to show that it was undoubtedly the purpose of the Legislature in the creation of this department that the department should concern itself with the task of surveying and formulating, for example, the aeronautical resources of the state rather than the actual construction of air fields.

As we understand your opinion request, you desire to know whether or not, in our opinion, your department would have the right under sub-section (g) of paragraph 7 of Section 15393, supra, to be considered a state airport agency as that term is defined in Paragraph I of H. R. 5024 now pending in the Congress of the United States.

Paragraph I reads as follows:

"'State airport agency' means any department, commission, board, or official of a State government which in the opinion of the Administrator has adequate powers and is suitably equipped and organized to satisfy the requirements of the Administrator for participation in the Federal-aid airport program herein authorized."

We also quote commencing at line 6 of Paragraph (b) of Section 7 of the proposed act down to the end of the paragraph and also from line 19 through line 23 of sub-section (c) of Section 7 of the proposed act.

"Unless and until a project is so approved either as originally proposed or as subsequently revised, the United States shall not pay, or be obligated to pay, any portion of any construction costs which may have been incurred by the State airport agency in the preparation and submittal of the project application or otherwise, and all such costs shall be the sole responsibility of the State airport agency. If and when a project is approved by the Administrator, however, such approval shall be deemed a contractual obligation of the United States for the payment of its proportional share of all the construction costs of the project."

March 14, 1945

"The Secretary of the Treasury shall thereupon set aside the share of the United States, payable under this Act on account of such project, which shall not exceed 50 per centum of the total estimated construction costs thereof: * * *"

It will be noted from the reading of these partial insertions that the act contemplates that the State Airport Agency shall formulate plans and specifications of the airport which they intend to construct and shall actually construct such airport with state money with the provision, however, that if the plans and specifications and construction meet with the approval of the federal administrator, and further providing it comes within the provisions of the monies allotted to the State of Missouri under Section 6, then the United States government will (if this bill becomes a law) defray fifty per cent of the cost of construction.

From the reading of H. R. 5024, which, because of its length, we do not attempt to copy into this opinion, it is our view that the Legislature, when they created the Department of Resources and Development, never contemplated that the department should have the power to launch upon an enterprise on behalf of the state of an "Airport Agency" as that term is defined in H. R. 5024, supra.

We are mindful, however, that the federal proposed act in the definition has a provision that the Administrator shall have discretion to determine whether or not a department has adequate power and is suitably equipped and organized to satisfy the requirement of the Act. Of course, on a question of discretion of the Administrator, it is impossible for our department to anticipate with any degree of certainty what he may or may not conclude with reference to the State Department of Resources and Development.

CONCLUSION

It is the opinion of this department that the State Department of Resources and Development does not have sufficient power under the law to be considered a State

Mr. Frank Ridgway

-5-

March 14, 1945

Airport Agency within the meaning of H. R. 5024 (a proposed bill to provide federal aid to the states for the development, construction, improvement and repair of public airports in the United States and for other purposes).

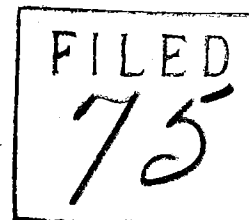
Respectfully submitted,

B. RICHARDS CREECH,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
Attorney General

JUSTICE OF THE PEACE: Jurisdiction in preliminary hearings,
under the Constitution of Missouri, 1945.



October 25, 1945

107/26

Honorable Allen Rolston
Prosecuting Attorney
Schuyler County
Lancaster, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based on the following facts:

"As prosecuting attorney of Schuyler County I am confronted with this proposition. About the middle of August, 1945, Boyd Crow was arrested on the felony charge of burglary and larceny. Complaint in proper form was filed before a justice of the peace, and preliminary had, and he was bound over to the Circuit court, there formal information was filed.

"The case will be called for trial before long, and I understand that the defense is taking the position that under the new constitution the office of justice of the peace was abolished at the time of this preliminary, and therefore the proceedings in preliminary were void, and that in fact the defendant has not been accorded a preliminary hearing. One of the attorneys for the defendant has stated that some circuit judge in Missouri has so ruled.

"It is my private opinion that the office of justice of the peace still exists

October 25, 1945

and will until the magistrate court comes in to being, but it is too big a question for me, and I would like to have your opinion on this question.

"I believe the provisions to be considered will be found in Section 20, of Article V, and in Sections 2, 3, and 4 of the Schedule."

While Article 5 of Chapter 30, R. S. Mo. 1939, makes frequent mention of a magistrate, that term, as used therein, refers to justices of the peace before whom preliminary hearings are held in felony cases. While that Article does not define a magistrate as being a justice of the peace, Section 3893, R. S. Mo. 1939, makes that definition in the following language:

"No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed in accordance with article 5 of this chapter. * * * " (Emphasis ours.)

It was clearly contemplated by Article V, Section 21, of the Constitution of Missouri of 1945 that legislation would be enacted setting up the magistrate courts provided in that Constitution. That section provides:

"The general assembly shall provide for the administration of magistrate courts consistent with this Constitution."

Since the provision for an examination before a justice of the peace in felony cases is clearly in conflict with the new Constitution, which abolishes the office of justice of the peace, Section 2 of the Schedule of the Constitution of 1945 must apply. That section provides:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Furthermore, as you intimate in your request, under Section 3 of the Schedule of the Constitution of 1945, all persons holding public office at the time the new Constitution became effective were not affected thereby.

Section 4 of the Schedule specifically refers to justices of the peace, as follows:

" * * * The justices of the peace shall continue to hold their offices and receive the emoluments thereof until their terms of office expire, upon which their records shall be transferred to the magistrate courts."

Up until the present time, no legislation has been enacted by the General Assembly which provides for the establishment of magistrate courts, as described in the Constitution, and therefore the present provisions of the law providing for preliminary examinations in felony cases, contemplating hearings before justices of the peace, remain in full force and effect.

CONCLUSION

It is the opinion of this department that the various offices of justices of the peace are still in existence throughout the state, and that those officers should continue to function and conduct preliminary hearings, as required by existing statutes, until legislation is enacted providing for the opera-

Honorable Allen Rolston

-4-

October 25, 1945

tion of magistrate courts, as set out in the 1945 Constitution, or until July 1, 1946, at which time present laws conflicting with the new Constitution become inoperative.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

COUNTY SCHOOL BONDS:

SUCH BONDS ARE NOT NEGOTIABLE.

April 16, 1945



4/19

Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. Robertson:

Your letter of April 2, 1945 to General Taylor, requesting an opinion on the negotiability or non-negotiability of school and township bonds, has been received and assigned to the writer for the opinion requested.

Your letter states:

"Will you please advise my office as to whether the school and township bonds can be negotiated as promissory notes are? In other words, could third parties buy the mortgage papers from the county, pay off the county loan, and continue to hold the papers in security for the loan in their own behalf?

"This question arises in the instance of a married couple who must now refinance their loan and one of the parties is in the State Hospital and necessarily, a guardian would have to be appointed to refinance the loan and, frankly, these people are not financially in a position to incur this cost unless it is absolutely necessary."

Your letter speaks of "school and township bonds". It is assumed that you mean only bonds made to the County for the use of the township to which school funds belong

April 16, 1945

when such funds are loaned by the County Court of any County under the provisions of Section 10384, Article 2, Chapter 62, R.S. Mo. 1939, (Laws of 1943, p. 881). If, in fact, "township bonds" as such were intended to be included in your request, this opinion should be a divided one and in part addressed to that subject. We take it, however, that you did not intend to include "township bonds" as such in your request for the opinion. Therefore we will confine the opinion to the question of the bond required by the statute named, as evidence of indebtedness under a school fund loan.

That part of said section requiring a bond and designating the procedure when a loan of school funds is made is as follows:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, * * * , with a bond, * * *. In all cases of loan, the bond shall be to the county, for the use of the township to which the funds belong. * * * "

It will be noted that said section requires that the bond shall be to the County, for the use of the township to which the funds belong. There are no provisions in said section or in any other section of the school loan statutes creating or setting forth words of negotiability in such bonds. The statute requires the bonds to be made to the County. It does not vest any power in County Courts to negotiate, assign or dispose of such bonds in any manner. The powers of County Courts respecting the loaning of school funds and the requiring of the bond, a mortgage on unencumbered real estate, and other security, if deemed advisable, and the method by which such bonds must be handled must necessarily be derived from the statutes. County Courts have no powers with respect thereto except what are expressly conferred upon them by the statute. The question of the extent of the powers of County Courts in preserving, lending, or collecting school funds has been before our Supreme Court in a number of cases.

In the case of Saline County et al., v. Thorp et al., 88 S.W. (2d) 183, l.c. 186, on this question our Supreme Court said:

April 16, 1945

"* * * It must be remembered that this is a case where public officers were acting for a governmental subdivision of the state, a county, in relation to funds held in trust for the public for school purposes. Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but as special trustees with every limited authority, and that every one dealing with them must take notice of those limitations. *Montgomery County v. Auchley*, 103 Mo. 492, 15 S.W. 626."

The Supreme Court made the same ruling in the case of *Montgomery County v. Auchley*, 103 Mo. 492, 1.c. 502, where the Court said:

"* * * The solution of this question will depend largely upon the power of the county courts in regard to school funds. That they are simply trustees of these funds will not be disputed. All powers they possess in regard to them are derived from the statutes.
* * * "

One of the questions before the Court in that case was whether the County Court had the right to delegate to another any of the duties enjoined upon the Court in collecting loans made by it of the school funds. On that question and in dealing with the strictness to which the courts hold County Courts in the performance of their duties in school fund loans, the Court, 1.c. 506, in the *Montgomery County* case, further said:

"* * * We would regard it as hazardous to lay down the doctrine that county courts may delegate the power to approve a loan and the security for a loan. If they can delegate this power to the prosecuting attorney, they can delegate it to anybody, not under oath, whether responsible or not, whether discreet or not, and if the bars should be thrown down thus, it would not be long till there would be no trust funds to be loaned."

In the case of *Ray County v. Bentley et al.*, 40 Mo. 236, 1.c. 242, on the same point our Supreme Court said:

April 16, 1945

"* * * In the care, management and control of the fund, the County Court acts purely in an administrative capacity, not as the agent of the county, but in the performance of a duty specifically devolved upon it by the laws of the State. There is nothing judicial in the exercise of its functions in this respect. The County Court does not derive its powers from the county, and it can exercise only such powers as the Legislature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. * * * "

Section 10384, supra, sets out what shall be stated in and the conditions and terms of the bond required but nowhere therein does it provide any language that would make such bond a negotiable bond. In order for any bond to be negotiable the instrument itself must contain language making the bond negotiable. 11 C.J.S., page 435, states that rule of law as follows:

"* * * Accordingly, the bond must contain words of negotiability, * * * and must be payable to order or to bearer. * * * "

The case of Lorimer v. McGreevy et al., 84 S.W. (2d) 667, was before the Kansas City Court of Appeals for decision. The most important point in the case, the opinion states, was whether the bonds, which were the subject of the suit, were negotiable bonds. The opinion, l.c. 676, on the point, states:

"* * * An instrument must carry the marks or necessary elements of negotiability upon its own face, and not elsewhere. * * * "

Section 3017, Article 1, Chapter 14, R.S. Mo. 1939, our Chapter on Negotiable Instruments states the requirements of negotiable instruments to be that they:

"* * * (4) must be payable to order or to bearer; * * * "

Honorable Marion Robertson -5-

April 16, 1945

Section 10384 requires such bonds to be made to the County. Being without words of negotiability and being without words creating authority in the County Courts to negotiate or sell such bonds, and the County Courts being merely the trustee of such funds, it is without power to barter, assign, negotiate, or dispose of such bonds. The statute gives the County Court no authority to transfer such bonds for any purposes. Such powers would have to be expressly conferred on County Courts by statute before they could transfer or assign said bonds, and said bonds would have to contain words of negotiability themselves. Neither of these things are provided in said section 10384, or elsewhere in our statutes.

CONCLUSION.

It is, therefore, the opinion of this Department that bonds taken by a County Court as evidence of a loan of school funds cannot be negotiated as are promissory notes, and that the County Court has no power under our statutes, or otherwise, to sell such bonds or the mortgage securing such loan, so as to convey the title to such bonds to a third person to hold as security for the loan.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

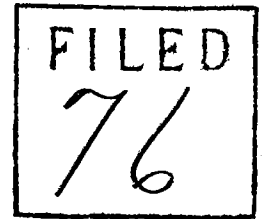
APPROVED:

J. E. TAYLOR
ATTORNEY GENERAL

GWC:MW:ir

CRIMINAL COSTS: Payment of Prosecuting Attorney's
fees on dismissal of cause.

June 8, 1945



Mr. Horace T. Robinson
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Mr. Robinson:

Under date of June 5, you requested an opinion from
this department, which reads:

"It is my understanding that under
the decisions of the Courts, payment
of fees of Prosecuting Attorneys can-
not be enforced unless there is a
conviction of the crime charged.

"Based upon these decisions, it
seems that in this County it has been
a custom, where cases are dismissed
in Justice Courts that only fees of
the Justice and Constable, or Sheriff,
are charged, and no Prosecuting Attorney
fee is fixed.

"I understand that this is probably
correct, insofar as enforcement of pay-
ment is concerned. However, I fail to
see where a voluntary payment of costs,
including a Prosecuting Attorney fee,
would be objectionable. In many in-
stances, it seems desirable to dismiss
cases, upon payment of costs, and I deem
it my duty to collect as many fees for
my office, for credit to the County
Treasury, as are legitimate. With this
in mind, I have insisted that where the
defendant agrees to pay costs, upon dis-
missal, that a Prosecutor's fee be in-

June 8, 1945

cluded. I fail to see that this is objectionable, where, as stated, it is a voluntary payment by the defendant.

"So that we may not have some question arise with the Auditors at some time in the future, I would be glad to have your office consider this matter, and advise."

As to the enforced collection of fees of prosecuting attorneys, I call your attention to State ex rel. Tudor v. Platte County, 40 Mo. 503; State ex rel. Alfred Gensel v. Thompson, 39 Mo. 427; State ex rel. Woods v. Narramore, et al., 52 Mo. 27. These cases hold that a prosecuting attorney is not entitled to charge, as costs, his statutory fees unless he has obtained a conviction in the case. These are old cases, but they have never been overruled and are still the law as far as we can determine.

As to whether or not the voluntary payment by the defendant of a prosecuting attorney's fee would be objectionable, I again call your attention to the case of State ex rel. Woods v. Narramore, supra, l.c. 30, wherein the court said:

"As against the defendant in criminal cases, costs are only the incident of conviction - resulting either from a confession of guilt or the verdict of a jury, and the County Justices, were clearly right when they made return that the demand of the relator for fees in cases of dismissal by agreement 'was illegal, and against public policy.'

"The law neither recognizes nor sanctions any such agreement between the Circuit Attorney and the defendant.

"And yet by means of collusive arrangements of this character costs have accrued, and a great number of counties been saddled with their payment.

"The prosecuting officer, if he be so minded, has so many facilities for making

June 8, 1945

illegal compacts with those who are indicted, that it illy becomes courts to increase those opportunities by giving the stamp of legality to iniquitous agreements, and thus widen by judicial construction the avenues to corruption."

The court went further, however, in their opinion and stated:

"But conceding that a defendant might by such an agreement bind himself, still it would by no means follow that the county would be bound thereby."

You will notice that the court said the defendant might bind himself, which leaves the proposition more or less undecided.

In your request you stated that you have insisted that a prosecutor's fee be included when a cause has been dismissed. In that connection we wish to call your attention to Section 4342, R.S. Mo. 1939, which is as follows:

"Every officer who shall, by color of his office, unlawfully and willfully exact or demand or receive any fee or reward to execute or do his duty, or for any official act done or to be done, that is not due, or more than is due, or before it is due, shall upon conviction be adjudged guilty of a misdemeanor."

In construing that statute the court said in the case of State v. Sanders, 62 Mo. App. 33, l.c., 34:

" * * * While the indictment is verbose and contains a mass of unnecessary repetition, it sufficiently enumerates the fees which the defendant illegally exacted. We take judicial notice of the fact that the fees thus exacted are not such as the prosecuting attorney is by law authorized to demand."

Mr. Horace T. Robinson

-4-

June 8, 1945

From the above language used by the court it would seem that a prosecuting attorney would be guilty of violating this section of the statutes when he demands fees that he is not authorized by law to demand.

Conclusion.

It is the opinion of this department that to insist or demand the payment of a prosecuting attorney's fee from the defendant, without obtaining a conviction against him, is not contemplated by the statutes and is illegal.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

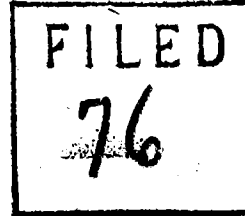
J. E. TAYLOR
Attorney General

WBD:ml

TAXATION AND REVENUE: Method of adding omitted property to
assessment rolls.

June 25, 1945

Honorable Horace T. Robinson
Prosecuting Attorney
Waynesville, Missouri



Dear Sir:

Reference is made to your letter dated June 18, 1945,
requesting an official opinion of this office, and reading
as follows:

"I have been informed by the members of
the County Court of Pulaski County that
they have found that a considerable num-
ber of residents of the County were not
assessed by the Assessor as of June 1,
1944, and that the names of such persons
did not appear on the books from which
the county valuation was certified to the
State Auditor. Inasmuch as a correction
of this inadvertence would necessarily in-
volve the Auditor's records, it seemed
proper that your office should determine
what procedure, if any, could be followed
to require payment of taxes this year by
those not so assessed.

"I have made a cursory examination of the
statutes, and Sec. 11000, R. S. 1939, seems
to be in point, though the decisions do not
seem to be very clear. The question arises,
of course, first whether the assessment may
be made of those omitted from the books, when
the assessment should be made, and by what
assessor.

"The indications are that a considerable
amount of taxes will be lost, unless this

June 25, 1945

oversight may be remedied. The shortage of time before collection of the taxes will be required, makes it important that early action be taken in the premises."

You have not indicated in your letter of inquiry the nature of the property omitted; this is pertinent for the reason that different modes of procedure are applicable to the addition of real and personal properties which have been omitted from the assessment rolls.

At first glance, it might be thought that Section 11000, R. S. Mo. 1939, provides a means by which any omitted property might be added to the assessment rolls. Said section reads, in part, as follows:

"Whenever, for any cause except when exemptions have been granted by law, there has been a failure to assess the property in any county for any year or years, the assessor of said county for the time being shall assess the property for the year or years in which said failure shall have occurred. * * * "

However, it has been held that this section is applicable only when there is a complete failure to make any assessment in the county or when such assessment shall have been held void for any cause. We quote from State v. Gehner, 27 S. W. (2d) 1, 1. c. 5:

"Respondents cite sections 12819, 12801, and 12969, R. S. 1919, in support of the contention that respondent assessor had jurisdiction to correct the omission in relator's 1926 income tax assessment. Section 12819 (now Section 11000, R. S. Mo. 1939) provides a scheme for subsequent assessment and collection of taxes where 'there has been a failure to assess the property in any county for any year or years.' This section covers the situation

June 25, 1945

where the entire assessment for the county has been omitted for any year or the assessment sought to be made has been held void for some reason. The section has no application to the omission of assessable personal property from the return of an individual taxpayer. State ex rel. Howard v. Timbrook, 240 Mo. 226, loc. cit. 240, 144 S. W. 843, cited by respondents, held this section applicable where the entire assessment for the year was void."

Since additions to the assessment rolls of omitted property cannot be made under the statute quoted, we necessarily must search further for authority to add such omitted property. We shall consider the method to be pursued with respect to personal property separately from that to be followed with respect to omitted real property, as in certain features different modes must be adopted for the purpose of adding such omitted property to the rolls.

There are two statutes relating to the addition of omitted personal property. Section 11006, R. S. Mo. 1939, reads, in part, as follows:

"The county board of equalization, at its annual meeting in each year, in addition to the powers now conferred by law, shall have authority to assess and equalize the value of any property that may have been omitted from the assessor's books then under examination by said board, and in case said board shall add any property, real or personal, to said assessor's books, it shall cause notice in writing to be served upon the owner of such property, * * * ."

*Jan 45
p. 177*

You will note from the wording of the statute quoted that proceedings taken by the county board of equalization can relate only to property omitted from "the assessor's books then under examination by said board." This necessarily restricts the right of the county board of equalization to the addition of property omitted from the last assessment. We quote from City ex rel. v.

June 25, 1945

Bowman, 71 S. W. 1122, reading, in part, as follows:

" * * * There is therefore no such thing as an equity in a county or in a city that will authorize an assessor, after he has completed his assessment and turned over his books to the proper officer, and after his assessment has passed the boards of equalization and of appeals, to repossess himself of the assessor's books, and enter therein personal property which by accident or intention was omitted from the list furnished by the taxpayer, and which escaped the notice of the assessor. He can only proceed at the time and in the manner pointed out by statute, and, to justify his assessment, he must be able to put his finger on the statute that gives him the authority to make it.
* * * "

We conclude from the above that upon adjournment of the county board of equalization, no statutory authority then exists by which the county assessor might add omitted personal property to the assessment rolls.

However, there is a further statute providing a means by which such property may be subjected to taxation. Section 11028, R. S. Mo. 1939, reads as follows:

47-444
p. 436
"After the various assessment rolls required to be made by law shall have been passed upon by the several boards of equalization and prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes, the several assessment rolls shall be subject to inspection by the commission, or by any member or duly authorized agent or representative thereof, and in case it shall appear to the commission after such investigation, or be made to appear to said commission by written complaint of any taxpayer that property subject to taxation has been omitted from said roll, or

individual assessments have not been made in compliance with law, the said commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered, at a time and place to be stated in said order, said time to be not less than five days from the date of the issuance of said order, and the place to be at the office of the county court at the county seat, or at such other place in said county in which said roll was made as the commission shall deem most convenient for the hearing herein provided. A copy of said order shall be published in at least one newspaper published in said county, if there be one, at least five days before the time at which said assessor is required to appear; or, where practicable, notice by mail may be given prior to said hearing to all persons whose assessments are to be considered. A copy of said order shall be served on the assessing officer at least three days before he is required to appear with said roll. The commission, or any member thereof, or any duly authorized agent, shall appear at the time and place mentioned in said order, and the assessing officer, upon whom said notice shall have been served, shall also appear with said assessment roll. The commission, or any member thereof, or any duly authorized agent thereof, as the case may be, shall then and there hear and determine as to the proper assessment of all property and persons mentioned in said notice, and all persons affected, or liable to be affected by review of said assessments thus provided for, may appear and be heard at said hearing. In case said commission, or any member or agent thereof who is acting in said review, shall determine that the assessments so reviewed are not made according to law, he or they shall, in a column provided for that purpose, place opposite said property the lawful valuation of the same for assessment. As to the property not upon the assessment roll, the said commission, or member or

agent thereof, acting in said review, shall place the same upon said assessment roll by proper description and shall place thereafter in the proper column the value required by law for the assessment of said property. The commission shall also spread upon said roll a certificate signed by each member officiating at the proceeding, showing the day and date on which said assessment roll was reviewed. For appearing with said roll as required herein the assessing officer shall receive the same per diem as is received by him while in attendance at the meeting of the county board of equalization. His claim shall be presented to and paid by the proper officer of the political subdivision, or municipality, of which he is the assessing officer, in the manner as his other compensation is paid. The action of the commission, or member or agent thereof, when done as provided in this section, shall be final, when approved by the state board of equalization. When any property has been reviewed, assessed and valued by the commission as herein authorized, such property shall not be assessed or valued at a lower figure by the local assessing or equalizing officer for the year the assessment is made."

In the case of State ex rel. v. Jones, 41 S. W. (2d) 393, the action of the State Tax Commission in adding omitted personal property to the assessment rolls, purportedly under the authority conferred upon such commission by the above statute (then Section 9855, R. S. Mo. 1929), was under attack. The Supreme Court upheld the action of the State Tax Commission with respect to the addition of such omitted property and quoted with approval the following portion of the decision in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 323 Mo. 180, 19 S. W. (2d) 746:

"The state tax commission is given general supervision over all the assessing officers of the state, with power to enforce its orders; it has all the powers of original assessment; it may receive complaints as to property liable to taxation that has not been assessed, or that has been fraudulently or

improperly assessed, and apply the proper corrective measures; it can raise or lower the assessed valuation of real or personal property either in specific instances or by class; and it has authority, on the complaint of any taxpayer and after the various assessment rolls have been passed upon by the several boards of equalization, but before the delivery of the tax rolls to the proper officers for collection, to hold hearings for the purpose of determining whether any property subject to taxation has been omitted from the assessment rolls and whether any property thereon has been improperly valued, and to make such changes with respect thereto as shall be necessary to make the assessment rolls conform to the facts as found by them.

"It is no doubt true that the state tax commission was not intended to supplant local assessing officers and boards, but very clearly it is given full and adequate power, not only to supervise, but to review, their work, and where it finds assessments which were not made conformably to law to revise them--and this by inserting where necessary, after a hearing, its own valuations in lieu of those made by the local authorities. It is also true that its revision of the assessments as made by county assessors and boards, in so far as it affects the equalization of the values of property among the respective counties of the state, whether such revision be made before or after the state board has acted, is subject to the approval of that board. And in this connection it should be said that, even though the action of the state board of equalization in the first instance completes the assessment judgment, that fact does not preclude a revision of such judgment by the tax commission, subject to the board's final approval. The technicalities relating to judgments of courts are without application."

From the foregoing, we believe that omitted personal property may be added to the assessment rolls either by the county

June 25, 1945

board of equalization prior to its final adjournment, or by the State Tax Commission, acting in accordance with the provisions of Section 11028, quoted above.

A different situation presents itself with respect to the addition of omitted real property. Supplementing action that might be taken by the county board of equalization under Section 11006, quoted supra, there appears Section 10977, R. S. Mo. 1939, authorizing other action that can be taken by the assessor. We quote said section, in part:

"If the assessor discovers any real property, presumed to be subject to taxation, which has not been returned to him by the clerk, he shall assess such property and enter the same on the assessment list.
* * * "

This section has been construed to authorize the addition of omitted real property whenever discovered. We quote from State ex rel. v. Carr, 178 Mo. 329, l. c. 233:

" * * * If the assessor discovers other property of the taxpayer which he failed to list, or which was omitted from taxation, it is his duty to assess it, even if it is discovered years afterwards."

In addition to the methods outlined above, omitted real property could also be added by the State Tax Commission in accordance with the provisions of Section 11028, R. S. Mo. 1939, the provisions of which section have been more fully discussed hereinbefore.

We believe that under the unambiguous provisions of Section 10977, supra, it is the duty of the incumbent assessor to place omitted real property on the assessment rolls whenever such omission is discovered. We further believe that the failure of the assessor to take such action can be cured, if necessary, by action taken by the State Tax Commission, acting under the provisions of Section 11028.

June 25, 1945

CONCLUSION

In the premises, we are of the opinion:

(1) That assessment of omitted personal property may be made by the county board of equalization after delivery of the assessment rolls by the assessor to the county clerk, subject to the limitation that property so added may be only that which has been omitted from the assessment rolls then under consideration by such board;

(2) That absent action by the county board of equalization, such omitted personal property may still be added by the State Tax Commission, as provided in Section 11028, R. S. Mo. 1939;

(3) That assessment of omitted real property may be made either by the county board of equalization when lawfully in session, subject to the limitation mentioned in paragraph (1) above, or by the State Tax Commission, in accordance with the provisions of Section 11028, or by the county assessor at any time when knowledge of such omission shall come to him;

(4) That omitted real property may be added to the assessment rolls by the person filling the office of county assessor at the time such omission is discovered.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

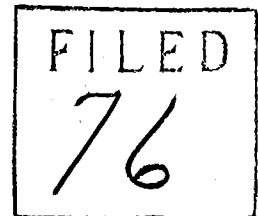
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

MOTOR VEHICLES: Person moving to this State from another state with intention to become a resident of this State and using foreign registered motor vehicle in connection with business in this State, should register motor vehicle in this State.

October 9, 1945



Honorable Allen Rolston
Prosecuting Attorney
Lancaster, Missouri

Dear Mr. Rolston:

Under date of October 4, 1945, you wrote the Attorney General making the following request for an opinion:

"As prosecuting attorney of Schuyler County, I have had the following proposition put before me, and I do not know how to answer it or how to proceed.

Mr. Doud has been a resident of the State of Iowa where his home and household goods are. His family consist of himself and wife. On June of this year he purchased an interest in a cleaning establishment, in Lancaster, Missouri. He and his wife have been operating it ever since, but staying temporarily with some of his wife's relatives at Downing, Missouri. It is his declared intention to move to Lancaster as soon as he can get a location. He owns and operates an automobile bearing an Iowa license plate. He uses this automobile driving to and from the place he stays to his place of business, and also in collecting and distributing clothing cleaned and pressed in the establishment. He frequently, and at irregular times makes trips to his home in Iowa.

"The question is whether or not he is required to take out a Missouri license

on his car. I can not find any law authorizing a prosecution in cases of this kind, the way I understand the law to be. "

The Missouri statutes relating to the registration of motor vehicles and prescribing the fees therefor, are found in Article 1, Chapter 45, R. S. Mo. 1939. Certain amendments to said article and chapter are found in Laws of 1943, and your attention is directed to sub-paragraph "(a)", Section 8369, R. S. Mo. 1939, as amended Laws of 1943, page 664, which is as follows:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the Commissioner, an application for registration on a blank to be furnished by the Commissioner for that purpose, containing: (1) a brief description of the motor vehicle to be registered, including the name of the manufacturer, the motor number and character, and amount of motive power, stated in figures of horsepower; (2) the name, residence and business address of the owner of such motor vehicle; (3) if said motor vehicle be a commercial vehicle the weight of the vehicle and the desired load in pounds; (4) if such motor vehicle be a specially constructed or reconstructed motor vehicle, the application shall so state and the owner shall furnish the Commissioner such additional information as he shall require."

Under this law it would appear that every owner of a motor vehicle which is operated and driven upon the highways of this State, is required to register the same. However, by the provisions of Section 8375, R. S. Mo. 1939, the system of reciprocity is authorized for nonresidents who come into this State bringing motor vehicles registered in the state of their residence. This section is as follows:

October 9, 1945

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

The latest motor vehicle laws of the State of Iowa, which we have been able to find, are found in Compilation of Laws Pertaining to Motor Vehicles and Related Subjects, prepared in 1943 and taken from the 1939 Code of Iowa, together with changes and additions made by the Forty-ninth and Fiftieth General Assemblies of the State of Iowa. Referring to this Compilation, we find on page 46, Section 5001.02, which is as follows:

"Every motor vehicle, trailer, and semi-trailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except:

"1. Any such vehicle driven or moved upon a highway in conformance with the provisions of this chapter relating to manufacturers, transporters, dealers, or nonresidents as contemplated by section 5003.01, or under a temporary registration permit issued by the department as hereinafter authorized;

"2. Any such vehicle which is driven or moved upon a highway only for the

purpose of crossing such highway from one property to another;

"3. Any implement of husbandry;

"4. Any special mobile equipment as herein defined;

"5. Any vehicle which is used exclusively for interplant purposes, in the operation of an industrial or manufacturing plant, consisting of a single unit comprising a group of buildings separated by streets, alleys, or railroad tracks, and which vehicle is used solely to transport materials from one part of the plant to another or from an adjacent railroad track to the plant and in so doing incidentally using said streets or alleys for not more than one thousand feet;

"6. Any vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails."

This section is followed by Section 5001.03 which exempts from the operation of the registration law vehicles owned by the United States, the State of Iowa, counties, municipalities and other subdivisions of government within the State of Iowa.

Sections 5003.01, 5003.02, 5003.03 and 5003.04 pertain to nonresident owners of the State of Iowa who are operating motor vehicles in that state which are registered in other states and the granting of reciprocity to them. These sections are as follows:

"5003.01 Nonresident owners exempt.
A nonresident owner, except as otherwise provided in sections 5003.02 and 5003.03, owning any foreign vehicle of a type otherwise subject to registration may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying

any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration card and registration plate or plates issued for such vehicle in the place of residence of such owner."

"5003.02 Nonresident carriers. Nonresident owners of foreign vehicles operated within this state for the intrastate transportation of persons or property for compensation or for the intrastate transportation of merchandise, shall register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state."

"5003.03 Nonresidents employed in state. Every nonresident, in addition to those mentioned in section 5003.02, but not including a person commuting from his residence in another state or whose employment is seasonal or temporary, engaged in remunerative employment or carrying on business within this state and owning and operating any motor vehicle, trailer, or semitrailer within this state, shall be required to register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state."

"5003.04 Scope of exemption. The provisions of section 5003.01 shall be operative as to a vehicle owned by a nonresident of this state to the extent that under the laws of the foreign country, state, territory, or federal district of his residence like exemptions and privileges are granted to vehicles duly registered under the laws, and owned by the residents of this state..

October 9, 1945

"Nonresident cars shall be listed within ten days after entering the state, with the county treasurer or department, on forms provided by the department. The department will issue a permit for the period of exemption."

Your letter states that the person who has come to this State from the State of Iowa has declared his intention of becoming a resident of Missouri, and further, that he is using a motor vehicle, which has previously been registered in the State of Iowa, in connection with his business which he is operating in this State.

The Missouri law requires the registration in Missouri of all motor vehicles operated or driven on the highways of the state, with the exception of certain vehicles owned by nonresidents temporarily within the state where the state of residence of the nonresidents grants to residents of Missouri the privilege of operating motor vehicles registered in Missouri without registering the same in such foreign state.

Where a person has a residence is a question to be determined from the facts. A legal residence is acquired by physical presence in a place for the necessary length of time to acquire a residence, coupled with the intention to make such place the legal residence of the person. Under your statement the man has declared his intention of acquiring a residence in Missouri and is now present within this state, although he has not been here a sufficient length of time to acquire a voting residence. If his presence here, coupled with his declared intention of becoming a resident, is sufficient to constitute him a resident, for the purpose of the motor vehicle registration law, then he should register his motor vehicle in this state.

However, if the facts and the length of the time spent in Missouri to date do not justify the registration of the motor vehicle by reason of the person's not having acquired a residence within this state, attention is directed to Section 5003.03, supra. By this section the State of Iowa expressly requires nonresidents carrying on business in the State of Iowa and owning and operating a motor vehicle, to register such vehicle in the State of Iowa. This section would preclude permitting residents of Iowa, engaged in business in Missouri and owning and operating

October 9, 1945

a motor vehicle, from operating such motor vehicle registered in Iowa, in Missouri, without first registering such vehicle in Missouri.

Conclusion

The motor vehicle mentioned in your letter should be registered in Missouri. The owner is either a resident of Missouri and should register such vehicle for that reason, or, if not a resident of this State but of Iowa, should register the vehicle for the reason that the State of Iowa would not permit a Missouri resident to operate a Missouri registered motor vehicle in Iowa under the circumstances mentioned in your letter without registering such vehicle in the State of Iowa.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

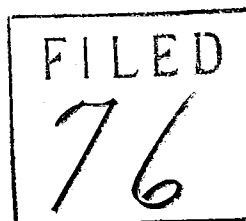
APPROVED:

J. E. TAYLOR
Attorney General

WOJ:EG

TAXATION AND REVENUE:

Right of owner of real property sold for delinquent taxes to redeem without reimbursing purchaser at tax sale for repairs made prior to expiration of redemption period.



November 29, 1945

11/30

Honorable Marion Robertson
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

Reference is made to your letter dated November 21, 1945, requesting an official opinion of this office, and reading as follows:

"I am in receipt of the following letter, requesting an opinion from your office, and I will appreciate it if you will comply therewith at your earliest convenience:

"I am requesting you to write the Attorney General of Missouri regarding the following:

"There were two pieces of property, in the name of Jesse Clay, Estate, sold at the Collector's Delinquent Tax Sale on November 1, 1943, to W. S. Steverson and Wife, for which a Tax Certificate was issued. This being the First Sale.

"After the first year elapsed, W. S. Steverson, the holder of the Tax Certificate, did extensive repairs on the house of this property, amounting to approximately \$500.00.

"On October 25, 1945, the heirs of the Jesse Clay Estate, deposited with this Office \$139.55, the full amount necessary to cover Purchase Price, all Taxes to date, and 8% Interest, saying they wished to redeem the above property.

"W. S. Steverson, the purchaser of Tax Certificate, was notified to bring in the Tax Certificate and accept payment of the redemption money involved. To date, he has failed to do so, and demands payment for all repairs made before he releases the Tax Certificate.

"The Attorney for W. S. Steverson has filed an itemized account for the repairs made, with this office, and contends that the property cannot be redeemed without payment of the said repairs.

"Please advise what procedure the Collector should take in this matter. Is he responsible for the collection of the improvements made, or shall the redemption of this property be completed without the return of the Tax Certificate?"

Your inquiry is primarily concerned with the procedure to be taken by the collector upon redemption of the real property previously sold for delinquent taxes, and you have further proposed the collateral question as to the duties of such collector with respect to improvements made subsequent to the sale but prior to the date of redemption.

The scheme for the redemption of real property sold for delinquent taxes is found in Sections 11145 and 11148, R. S. Mo. 1939.

Section 11145, R. S. Mo. 1939, reads as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs

or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

Section 11148, R. S. Mo. 1939, reads as follows:

"When lands sold for taxes, or any portions thereof, shall be redeemed, the county collector shall insert a memorandum of such redemption on the record of the certificate of purchase applicable thereto, stating the quantity or description of the portion redeemed, if not the whole, the date thereof, and by whom made, and sign the same officially, and shall likewise give a certificate thereof to the person redeeming. The person redeeming shall then present to the county clerk the certificate of redemption and the county clerk shall then enter on his record of sales of land for delinquent taxes the recital of such redemption, the date thereof, and the person redeeming."

You have stated in your letter of inquiry that the amount tendered in this particular case to the collector is sufficient to comply with the requirements of Section 11145, R. S. Mo. 1939, quoted supra. We, therefore, believe that the necessary steps to be taken by the collector are those outlined in said section and Section 11148, R. S. Mo. 1939, also quoted supra. Such steps to be taken are, in substance, the mailing of the notice to the purchaser, his heirs or assigns, of the deposit for redemption, the insertion of a memorandum of such redemption on the record of the certificate of purchase applicable thereto, showing the date when such redemption was made and by whom, signing the same officially, and delivering to the redeeming owner a certificate of such redemption having been made. These are the sole duties imposed upon the collector by the statutes.

Your additional inquiry as to whether or not the collector is responsible for the collection of compensation for improvements made on the property prior to redemption is somewhat ambiguous. In the body of your letter of inquiry you have referred to the expenditure as having been for "repairs," while in the last paragraph you have designated such expenditure as having been for "improvements."

By the provisions of the statutes, only compensation for improvements may be recovered by the purchaser of the tax certificate, and then only for improvements made at certain times. We direct your attention to the provisions of Section 11147, R. S. Mo. 1939, which reads as follows:

"In case any lasting and valuable improvements shall have been made by the purchaser at a sale for taxes, or by any person claiming under him, and the land on which the same shall have been made shall be redeemed as aforesaid, the premises shall not be restored to the person redeeming, until he shall have paid or tendered to the adverse party the value of such improvements; and, if the parties can not agree on the value thereof the same proceedings shall be had in relation thereto as shall be prescribed in the law existing at the time of such proceedings for the relief of occupying claimants of lands in actions of ejectment. No compensation shall be allowed for improvements made before the expiration of two years from the date of sale for taxes." (Emphasis ours.)

We believe from the wording of the statute quoted that the collector has no concern with the collection of compensation for such improvements made. You will note that the statute speaks of the land whereon such improvements have been made having been "redeemed as aforesaid," and further mentions that the premises shall not be restored to the person redeeming until such compensation for improvements shall have been made. This seems to indicate that the right to redeem is not conditioned upon the payment of the compensation for improvements made within the time limited, but goes only to the right of the person so redeeming to be restored to the possession of the premises. It becomes an adversary matter between the person redeeming and the person having made such improvements.

That this is the proper construction to be placed upon this statute is borne out by the further provisions therein relating to the method of determining the value of such improvements. It is provided that the same proceedings for the determination of the value of such improvements shall be had as is prescribed for the relief of occupying claimants in actions of ejectment.

The ejectment statute referred to is Section 1548, R. S. Mo. 1939, which reads as follows:

"If a judgment or decree of dispossession shall be given in an action for the recovery of possession of premises, or in any real action in favor of a person having a better title thereto, against a person in the possession, held by himself or by his tenant, of any lands, tenements or hereditaments, such person may recover, in a court of competent jurisdiction, compensation for all improvements made by him in good faith on such lands, tenements or hereditaments, prior to his having had notice of such adverse title."

The legislative intent seems to be to restrict recovery for "improvements" and not for "repairs." We find that these words have severally acquired reasonably fixed legal meanings. We quote from Words and Phrases, Perm. Ed., Vol. 20, page 330:

"The word 'repair,' as defined by Webster:
'Act of repairing; restoration or state of being restored, to a sound or good state after

decay, waste, injury, etc.'-- is applied by courts in the construction of statutes and contracts. The word 'improvement,' defined by the same authority as 'a valuable addition or betterment as a building, clearing, drain, fences, etc., on land,' is a broader word than 'repair,' but includes the latter and is also practically applied by the courts."

In view of the fact that in each instance it would perhaps become necessary to determine from the facts whether or not a particular type of work done or materials used upon real property constituted such an "improvement" as might serve as the basis for recovery of compensation therefor, we believe that the Legislature has adopted the present scheme so that such matters might be determined in actions between the person redeeming such real property and the person making claim for such improvement.

CONCLUSION

In the premises, we are of the opinion that upon receipt by the collector from a person having the right to redeem real property sold for delinquent taxes, of the full sum of the purchase money named in the certificate of purchase relating to such real property, and all the costs of the sale, together with interest at the rate specified in such certificate, with all subsequent taxes which have been paid on such real property by the purchaser, his heirs or assigns, with interest computed thereon at the rate of eight per centum per annum, and all costs incident to entry of recital of such redemption on the records of the collector, it becomes the duty of the collector to mail to the purchaser, his heirs or assigns, at the last postoffice address, if known, of such purchaser, his heirs or assigns, or if such postoffice address be not known, to the address of the purchaser shown in the record of the certificate of purchase, notice that such deposit for redemption has been made. We are further of the opinion that upon such redemption having been made, the collector shall further make the necessary memorandum of such redemption on the record of the certificate of purchase applicable to such real property, sign the same in his official capacity, and deliver to the person redeeming a certificate of such redemption having been made.

Honorable Marion Robertson - 7

We are further of the opinion that the collector has no duties in connection with the collection of compensation for improvements made on such real property subsequent to the sale of the same for delinquent taxes, as such matters are to be determined either by agreement between the person redeeming and the purchaser of the tax certificate or by court action as provided by Section 11147, R. S. Mo. 1939.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

W. O. JACKSON
(Acting) Attorney General

WFB:HR

COUNTY COURT

Grant by the County Court of one thousand (\$1,000) dollars or more to the American Legion Post of Vienna, Missouri, for the erection of a building in which to hold American Legion meetings.

September 12, 1945

FILED

77

9/20

Honorable Hamp Rothwell
Prosecuting Attorney
Marion County
Vienna, Missouri

Dear Mr. Rothwell:

In your letter of August 27, 1945, you request an opinion of this Department, which letter reads as follows:

"The American Legion Post of Vienna wants the County Court to grant (give) one thousand dollars or such sum as the Court sees fit to erect a building in Vienna for the purpose of holding meetings of the American Legion, entertainments etc.

"I am unable to find any authority for such a grant or gift and it seems like Sec. 25, page 48, of the new constitution, prohibits the county from doing such things. Will you please let me have your opinion on this by next Tuesday, September 4th?

"Do you know of any authority for the State of Missouri to make such a grant or gift in any amount? Some of the members here tell me that the State has done that in several counties. If so, it is all news to me."

We think the determination of this matter turns upon the provisions of the Constitution of 1945, relating to the grant of public money to corporations, associations or individuals. Section 23 of Article VI of the Constitution of 1945, reads as follows:

September 12, 1945

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

Section 25 of the Constitution of 1945, reads as follows: (Section 25 of Article VI)

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may authorize any city of more than 100,000 inhabitants to provide for the pensioning of other employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

At the outset, it will be well to note that the grant of public money by the County Court for the purpose stated in your letter, does not fall within any of the exceptions set out in Section 25 of the Constitution of 1945.

There being no cases to date which have interpreted these sections of the New Constitution, we must look to the decisions interpreting the similar provisions of the Constitution of 1875, since the Constitutional Convention must be considered to have been aware of the interpretations placed upon those sections by the Courts. State ex rel. vs. St. Louis, (1909), 216 Mo. 47. These sections were Sections 46 and 47 of Article IV of the Constitution of 1875. It is sufficient to state that the provisions of these sections, in

regard to their pertinency in regard to the matter before us, are identical with the provisions of the New Constitution above quoted.

The cases of these sections of the old Constitution reveal the fact that these provisions have been strictly construed, and that public monies cannot be granted to individuals, associations, or corporations unless for a public purpose. State ex rel. vs. Hostetter (1937), 340 Mo. 1155, 104 S.W. (2d) 670; State vs. Gordon (1914), 261 Mo. 631; State ex rel. Hackmann (1918), 275 Mo. 636; State vs. Seibert (1894), 123 Mo. 429; State vs. Board of Trustees (1915), 192 Mo. App. 583; State vs. St. Louis, supra.

There is no question but that the monies herein involved are public monies, since they are to be drawn from the treasury of the County. (State vs. Hostetter, supra). Furthermore, the grant of the money, as indicated by your letter, will be a gratuitous payment, and this is the type of grant to which the constitutional provision applies. (State vs. Hackmann, supra).

The remaining question is, whether a grant to the American Legion for the purpose stated, could be considered a grant for a public purpose. Several cases have discussed this question, and have defined "public purpose". Public monies must be disbursed only for public burdens or purposes. (State vs. Seibert, supra). Public monies must not be disbursed to private individuals for something wholly disassociated with the interests of the public itself. (State vs. Board of Trustees, supra). A public purpose is one governmental in character. (State vs. Gordon, supra). In Kennedy vs. City of Nevada (1925), 222 Mo. App. 459, the Court, in holding that a grant was not for a public purpose, considered it very important that only one class of the population would be able to use the tourist camp, the land for which was to be purchased by a public grant. Whether a thing is for a public purpose is to be determined by custom and usage, i.e., whether it is customarily thought of as a purpose which is public in nature. (State vs. O'Rear, 277 Mo. 320 (1918)).

The public grant herein involved, does not fall within a meaning of "public purpose" as defined by these cases. The County, or for that matter, any political subdivision, does not have the burden of providing a meeting place for special groups of citizens whether organized or not. Such matters are to be taken care of by the citizens themselves, and the political subdivision of the Government

has never been considered to have the burden of providing facilities for such purposes. The provision for a meeting place for the American Legion or any other group of private citizens is, we think, wholly disassociated from the interest of the public itself. While in the broad sense, the public may derive some benefit from the activities of the American Legion, it cannot be said that this incidental benefit places the matter of a meeting place for a group of private citizens in the category of a public interest. The public may derive incidental benefits in many similar cases, but this has never been considered enough to place upon the political subdivision of providing any aid to such group of citizens. The activities of the American Legion are not governmental in character, but partake of the nature of civilian activity solely. Strictly speaking, only one class or group of citizens will be benefited by the grant herein involved, that being the members of the American Legion. Custom and usage do not sanction such a grant, since providing for a meeting place for the American Legion or any other civilian group, has never been considered by the people as something which is, or should be, done by the county or political subdivision. Such matters have always been arranged, and carried out by the members of the American Legion, or other groups themselves.

In State ex rel. vs. St. Louis, 216 Mo. 47 (1908), the Supreme Court had before it the question of whether a building could be erected in Forrest Park, St. Louis, Missouri, for the purpose of an art museum. The City ordinance of St. Louis, authorized the erection of such a building for the purpose of art education. The Board of Control of the St. Louis School and Museum of Fine Arts, a department of Washington University, was, by the ordinance, authorized to erect such a city building. The Supreme Court of Missouri held that the grant of public money for such a purpose was void as violative of the constitutional prohibition (Sections 46 and 47 of Article IV of the Constitution of 1875), against the granting of public money or thing of value in aid of or to any individual, association or corporation, or to make any appropriation or donation to, or in aid of, any corporation or association.

In that case, it was argued that the museum funds were for a public purpose, since the building was to be opened to the public at certain times, and further, would be an important addition to the City as a whole. In spite of this contention, the Court in that case, l.c. 95, said:

"* * * In our opinion this was an attempt to require the city of St. Louis and its taxpayers to donate this art museum tax to the support of a department of Washington University, a private corporation, and,

September 12, 1945

in our opinion, to that extent the act was clearly within the prohibitions of the Constitution already noted, and therefore void."

We think that the grant of money by the City in the above case more nearly partakes of the nature of a public purpose than would the grant of money by the County under the facts herein involved in the instant case. Yet, the Supreme Court in that case held such a grant void as violative of the constitutional provisions of the Constitution of 1875, similar to those found in the Constitution of 1945.

CONCLUSION.

It is, therefore, the opinion of this Department that the grant of one thousand (\$1,000) dollars, or more, by the county Court of Maries County, to the American Legion Post of Vienna, Missouri, for the purpose of erecting a building in which to hold meetings and entertainments of the American Legion, would be in violation of Sections 23 and 25 of Article VI of the Constitution of 1945.

Respectfully submitted,

SMITH N. CROWE, Jr.
Assistant Attorney General

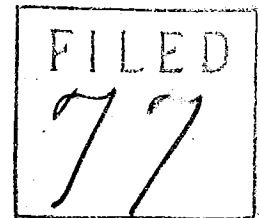
APPROVED:

J. E. TAYLOR
Attorney General

SNCj:ir

TAXATION AND REVENUE: Owner of pinball machines and music boxes not assessable as a merchant under Section 11303 and Section 11305, R. S. Mo. 1939.

November 9, 1945



11/16

Honorable Max F. Ruler
Assistant Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Sir:

Your letter of October 15, 1945, receipt of which we have previously acknowledged, reads as follows:

"There is before me a question that may be propounded by the local board of equalization upon a tax matter, which was levied by them against a client of Mr. Earl E. Roberts a local attorney here.

"He seems inclined to contest this matter and in that regard wrote you on October 4th and your answer to his request for an opinion of October 5th is before me.

"If it is within your province to issue an opinion on such taxation to me as an officer of this county on music boxes commonly known as juke boxes and pin-ball machines, I would be glad to have such for my guidance when called upon for my opinion from the local board of taxation."

Your letter is to be read in connection with that of Mr. Earl E. Roberts, which is referred to in your correspondence. The question involved in a reading of these two letters presents itself as being - Is the owner of pinball machines and music

boxes, commonly known as juke boxes, subject to being assessed as a merchant by the county board of equalization?

Section 11303, R. S. Mo. 1939, states:

"Every person, corporation or copartnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant."

Section 11305, R. S. Mo. 1939, states:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in March and the first Monday in June in each year: Provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

In the case of State v. West, 34 Mo. 424, 1. c. 428, Judge Dryden holds:

"To be a merchant in the sense of the law, the dealer must have on hand goods, wares, and merchandise ready for sale and present delivery, and must also actually deal in the selling of the same. * * *"

This interpretation has been upheld in numerous cases to date and has not been reversed in any.

In the case of *Edmonds v. City of St. Louis*, 156 S. W. (2d) 619, 1. c. 624, it is said:

"If the business of selling merchandise through slot vending machines were fundamentally the same as that of a merchant, we would agree with appellants. But it is not. For over 80 years the statutory definition of a merchant has been substantially the same, under what is now Sec. 11303, R. S. 1939, Sec. 10075, Mo. Stat. Ann. p. 8062, to wit (*italics ours*): 'Every person, corporation or copartnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant.' But automatic vending machines may be located on the premises of another, as in arcades, hotel lobbies, railroad stations, restaurants or other frequented places. They may be operated without personal attention, and the stocks vended are necessarily restricted in character and quantity. In a sense, the space they occupy might be called a 'stand or place,' but not within the meaning of the statute. While a form of merchandising they are not integral parts of a mercantile establishment."

That was a case which was stronger than the present situation since the machines were used for vending cigarettes. In the present situation the owner of the pinball machines and music boxes merely sells service or entertainment through such machines and no tangible goods, wares, or merchandise in the light of these definitions.

Various jurisdictions have defined what the term "goods, wares and merchandise" means.

The case of *Dyott v. Letcher and McKee*, 29 Ky. (6 J. Marsh) 541, 1. c. 543, states:

"Those articles only, which are sold or kept for sale by a merchant, can be properly denominated goods, wares, and merchandise."

The case of Somerby v. Buntin, 118 Mass. 279, the court was interpreting whether a sale of letters patent for an invention was goods, wares, and merchandise within the statute of frauds. C. J. Gray said (l. c. 285):

"* * * Before letters patent are obtained, the invention exists only in right, and neither that right, nor any evidence of it, has any outward form which is capable of being transferred or delivered in specie, or which, upon any construction, however liberal, can be considered as goods, wares or merchandise. * * *"

So, in the present situation there is no outward form which is capable of being transferred or delivered in specie so as to be considered goods, wares, or merchandise within the meaning of Section 11303, R. S. Mo. 1939.

The case of Smith v. Wilcox, 24 N. Y. 353, l. c. 358, holds:

"'Goods, wares, and merchandise' include all movable property that is ordinarily bought and sold."

The owner of pinball machines and music boxes does not sell tangible material such as could be transferred or delivered in specie. Therefore, Sections 11303 and 11305, R. S. Mo. 1939, may not be said to include such owner of pinball machines and music boxes as a merchant.

Conclusion

.The owner of pinball machines and music boxes, commonly called juke boxes, is not subject to be assessed as a

Hon. Max F. Ruler - 5

merchant, by the county board of equalization, under Section 11303 and Section 11305, R. S. Mo. 1939, since he merely sells service and entertainment through such machines and not goods, wares and merchandise. Also, he does not occupy any "stand or place" within the meaning of the statute.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

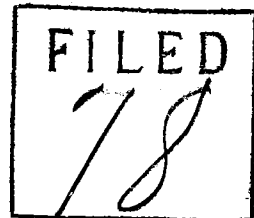
APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

PROBATE JUDGES: Disposition to be made of fees earned prior to but collected subsequent to effective date of Sec. 13404a, Laws of 1943, page 868.

January 30, 1945



Honorable C. S. Saltsman
Judge, Probate Court
Steelville, Missouri

Dear Sir:

Reference is made to your letter of January 11, 1945, requesting an opinion of this office, and reading as follows:

"The 1943 Legislature changed the laws affecting salaries and fees of the Probate Judge. Under the laws of 1943 at page 868, Probate Judges are to receive a salary of \$100.00 a month in counties such as Crawford County. The Session Acts provide that on and after the effect of that act, Probate Judges are required to remit to the county at the end of each month 'all fees collected by such Judge or Clerk'. The Session Acts do not provide for the disposition of fees that were earned by the Probate Judge before that act took effect. It is further provided that at the end of each year the Probate Judge file with the County Clerk an annual statement or recapitulation of all fees collected by his office for the year and that should such fees exceed the amount of \$1200.00 (in counties such as Crawford County) such excess fees would be paid to the Probate Judge, not to exceed the amount as provided for in Section 13404, Revised Statutes of 1939. This was done by my office and I remitted and paid to the county the sum of \$402.75 which amount represented fees that were earned during the year of 1943 before the Session

January 30, 1945

Acts above referred to took effect. It is my contention that these fees so earned at that time and before the taking effect of this act should not have been paid into the County Treasury and that they are, in fact, due me at this time."

And your subsequent communication or letter of January 25, 1945, supplying the following additional information:

"I am in receipt of your communication of January 24th relative to my inquiry regarding fees shown on my 1944 report filed with the County Clerk. You have asked whether or not these fees were collected before or after November 22, 1943, at which time the Acts of 1943 became effective. I wish to advise you that these fees were collected after that date. They were collected at the March and June terms of the Probate Court of Crawford County for the year 1944, but these fees were actually earned and were due before November 22, 1943, but were not paid because the administrators of the various estates had not yet made settlement. The work for which the fees were due was done after the September Term of the Probate Court of 1943 and before the effective date of the Acts of 1943 which changed the law with reference to salaries of the Probate Judge."

Your inquiry divides itself into two questions:

(1) Must the accrued fees due your office on the effective date of Section 13404a, Laws of 1943, page 868, be reported to the County Court, and when thereafter collected must such accrued fees be paid into the County Treasury in the same manner as fees earned and collected subsequent to the effective date of the statute?

(2) Is the Probate Judge entitled to receive such fees so paid into the County Treasury upon making final re-

January 30, 1945

port to the County Court of fees earned and collected during the current year?

With respect to (1), we think a portion of an opinion dated August 30, 1943, directed to Honorable John M. Gallatin, President, Missouri Probate Judges' Association, Chillicothe, Missouri, is in point. We enclose herewith a copy of such opinion, together with a copy of an additional opinion, dated August 25, 1943, directed to Honorable Forrest Smith, State Auditor, Jefferson City, Missouri, to which some reference is made in the first mentioned opinion.

With respect to (2), we direct your attention to the specific provisions of Section 13404a, Laws of 1943, page 868. We quote:

" * * * but should the yearly sum of fees earned and collected by any Probate Judge of any such county, and his clerk or clerks, by virtue of the office, exceed the amount which said Judge would be entitled to receive by reason of the population of said county as aforesaid, then such judge shall be entitled to retain the excess subject to the limitations set out in Section 13404 of Article 2, Chapter 99, Revised Statutes of Missouri, 1939, and the County Court shall draw a warrant or warrants upon the County Treasurer in favor of such Judge for such excess fees. * * *"

CONCLUSION

We are, therefore, of the opinion that the fees earned prior to the effective date of Section 13404a, found in Laws of 1943, page 868, were properly reported to the County Court; that such fees when collected were properly paid into the County Treasury, and that you are now entitled to receive such fees by a warrant drawn by the County Court upon the County

Honorable C. S. Saltsman

-4-

January 30, 1945

Treasurer, provided that the payment of such fees does not permit you to retain total fees in a year greater than the limitations found in Section 13404 of Article 2, Chapter 99, R. S. Missouri, 1939.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

WFB:HR

SCHOOLS: Tuition cannot be paid for negro students attending college outside of Missouri for courses beyond those offered at the University of Missouri.

February 6, 1945

FILED

78

2/6

Honorable Roy Scantlin
State Superintendent of Schools
Jefferson City, Missouri

Attention: Mr. Joy O. Talley, Supervisor
Vocational Rehabilitation

Dear Sir:

We have your letter of recent date, which reads as follows:

"We should like an opinion as to whether or not the State of Missouri will pay the tuition for negroes outside the State for medical school beyond the two-year medical course offered at the University of Missouri."

It has been and is now the policy of this state to provide its colored citizens educational opportunities equal to those afforded to white citizens. In discussing the statutes relative to higher education for negroes, our Supreme Court, in the case of Lincoln University v. Hackmann, 295 Mo. 118, 243 S. W. 320, said:

" * * * The act changed the name of Lincoln Institute to Lincoln University, vested the control thereof in a board of curators, and authorized the board to reorganize the institution so that it shall afford the negroes of the state opportunity for training up to the standard furnished at the State University of Missouri, * * *."

Again, in the same case, 243 S. W. 1. c. 321, the court said:

" * * * The statute in this respect may be said to be mandatory in its nature in order that its great beneficent purposes may be carried into effect and the state realize the benefits of extending to the negroes of our state the education, culture, and training afforded by the University of Missouri."

Providing equal educational opportunities for whites and negroes, even though in separate schools, meets the equal protection requirements of the Federal Constitution. (State ex rel. v. Canada, 305 U. S. 337, 83 L. Ed. 208.)

Section 10774, R. S. Mo. 1939, reads, in part, as follows:

"The Board of Curators of the Lincoln University shall be authorized and required to reorganize said institution so that it shall afford to the negro people of the state opportunity for training up the standard furnished at the State University of Missouri. * * * "

Section 10779, R. S. Mo. 1939, reads as follows:

"Pending the full development of the Lincoln University, the Board of Curators shall have the authority, if and when any qualified negro resident so requests, to arrange for his attendance at a college or university in some other state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University, and to pay the reasonable tuition fees for such attendance."

February 6, 1945

The two statutes above referred to clearly show that the Legislature intended to grant to negro people the opportunity to secure the same educational advantages which white people have in Missouri. White people can only obtain two years' instruction in medicine at the University of Missouri. By Section 10779, supra, the Board of Curators of Lincoln University is authorized to pay the tuition of negro students in a college or university in another state for the purpose of allowing them to take a course or to study subjects now provided at the University of Missouri and not provided at Lincoln University. Since only two years' instruction in medicine is offered at the University of Missouri, it must follow that even though no instruction in medicine is offered at Lincoln University, the Board of Curators of that school could only pay the tuition of colored students in a college or university in another state to allow them to procure a two-year course in medicine. If the tuition of colored students could be paid for more than a two-year course in medicine in another state, then white students would not have equal educational opportunities with the negroes, since white students must pay their own tuition beyond a two-year course in medicine.

CONCLUSION

It is, therefore, the opinion of this department that there is no provision in the laws of Missouri providing for the payment of the tuition of negroes for attending colleges or universities outside the state to obtain a medical course beyond the equivalent of the two-year course offered by the University of Missouri.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HHK:HR

SCHOOLS: County court cannot annex unorganized territory, under Sec. 10409, R. S. Mo. 1939, where there are more than twenty pupils of school age within such unorganized territory.

May 17, 1945

5/19



Honorable Roy Scantlin
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date, which reads as follows:

"This Department is again confronted with the problem of the apportionment of state school moneys to the Waynesville School District of Pulaski County on account of the attendance of pupils resident in the defense housing unit of the Fort Leonard Wood Military Reservation owned by the United States Government. This problem was presented to your Department for advice in my request of February 11, 1944, for an official opinion. At that time the defense housing unit named above was not considered a part of the Waynesville School District.

"Your opinion of April 19 held that the State Superintendent of Schools is not authorized to grant state aid to the Waynesville School District based upon the fact that it is providing educational facilities for pupils residing in the Fort Leonard Wood area.

"Since your official opinion has been issued, the Board of Education of the Waynesville School District petitioned the county court for the annexation of the housing unit on the

May 17, 1945

Fort Leonard Wood Reservation along with parts of other school districts considered as unorganized territory since the establishment of the military reservation. The county court in its order of March 26, 1945, officially annexed the territory as set out in the petition which is presumed to include the housing unit of the military reservation. A copy of the court's order is attached.

"A question has arisen whether or not the county court has authority under Section 10409, R. S., 1939, to accept the housing unit of the Fort Leonard Wood Reservation as unorganized territory and officially annex it to the Waynesville School District, thereby extending the school district line across the military reservation.

"The laws of this state do not seem to give county courts or school districts any jurisdiction over territory located within military reservations such as Fort Leonard Wood. The question has also arisen in other states. I refer you to one instance in the case of State ex rel. Moore v. Board of Education of Euclid City School District, 57 N.E. (2d) 118. Court of Appeals of Ohio, Cuyahoga County, March 20, 1944.

"The court in this case held that the Federal Government has exclusive jurisdiction over the property and the state or city could not build a school house within the area if it so desired. Basing its decision on this premise and noting the burden that may be cast upon the shoulders of local taxpayers if the children residing in all such federal projects are entitled to free schooling, the court denied the petition.

"If the territory in the housing unit in the Fort Leonard Wood Reservation should become a part of the Waynesville School District of Pulaski County and the pupils' attendance should be counted for establishing teaching

May 17, 1945

units and other apportionments according to the laws of this state, the amount so apportioned would be far short of the cost of providing the education facilities required. Then the additional cost of paying for educating these children would be a burden upon the taxpayers in the remainder of the district who reside outside of the military reservation.

"I shall appreciate your advice and official opinion in answer to the following questions:

"Has the Pulaski County Court the power to annex territory lying within the Fort Leonard Wood Military Reservation owned by the United States Federal Government when petitioned by the adjacent Waynesville School District of said County?

"If so, would such annexation give the Waynesville Board of Education the legal authority for counting the pupils living in the housing unit of the Fort Leonard Wood Military Reservation as resident pupils in making application for the state school moneys apportionments?"

Your letter submits two questions. However, the second question is contingent upon the answer to the first question, and if the answer to the first question is "no", then the second question need not be answered, since the opinion of this office of April 19, 1944, referred to in your letter, would be the answer to the second question under those circumstances.

While your letter does not so state, you have advised us that the territory which the county court undertook to annex contained several hundred pupils of school age. This fact becomes important in connection with a discussion of Section 10409, R. S. Mo. 1939, which reads as follows:

"Whenever there shall be in this state any territory not organized into a common, town

or city school district, and not containing within its limits twenty or more pupils of school age, any three or more taxpayers in such unorganized territory, or in any adjacent common, town or city school district, may file a written petition in the office of the clerk of the county court praying that such unorganized territory shall be attached to the nearest and most available common, town or city school district, and at the next meeting of the county court the said petition shall be taken up and heard by the court, which shall, after being duly informed and advised, make an order annexing such territory to the nearest and most available common, town or city school district, and thereupon such territory shall become a part of such district, which fact shall be duly entered by the proper officers upon the tax books and other records of the county."

It will be noted that by the foregoing statute the county court is only authorized to annex unorganized territory to another school district if said unorganized territory does not contain as many as twenty pupils of school age. Since the Fort Leonard Wood Reservation, referred to in your letter, contains several hundred pupils of school age, it follows that Section 10409 does not furnish any authority for the county court to annex such reservation to the Waynesville School District.

It would seem that the purpose of Section 10409, supra, was to take care of a particular situation. That situation was where there was unorganized territory which did not contain as many as twenty pupils of school age, and in such a situation the county court was given authority to attach said territory to some other school district in order that the children in such territory could receive the benefits of public schools. Clearly, the situation referred to in your letter does not come within the provisions of said section.

CONCLUSION

It is, therefore, the opinion of this office that the order of the County Court of Pulaski County made on the 26th

Honorable Roy Scautlin

-5-

May 17, 1945

day of March, 1945, undertaking to attach the Fort Leonard Wood Reservation to the Waynesville School District, under the provisions of Section 10409, R. S. Mo. 1939, was void and of no effect.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

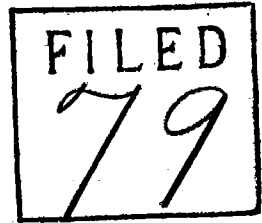
J. E. TAYLOR
Attorney General

HHK:HR

26 P
✓
TOWNSHIP ORGANIZATION:

Townships may not divide among special road districts a surplus of taxes remaining after township expenses have been paid; that such townships may legally issue warrants in any year against anticipated taxes for that year.

May 24, 1945



Honorable Theo. R. Schneider
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Mr. Schneider:

This will acknowledge your letter of May 11, 1945, requesting an opinion from this Department on two propositions incident to the administration of Chapter 101, R. S. Mo. 1939, which constitutes the township organization law of this State. Your letter states:

"Bates County is under township organization and one of the townships has three special road districts except for a small acreage. Assessments are made and taxes are collected by each of the road districts for the maintenance of the roads within the district. The township also levies and collects a township tax and each year has been accumulating a surplus of funds in this account.

"Section 14015, Revised Statutes of Missouri, 1939, provides that surplus funds of this nature shall be held by the township trustee until needed to pay township expenses. The question involved is whether or not after the township expenses have been entirely discharged the surplus remaining can be divided among the special road districts within the township.

"I would appreciate an opinion in the premises at your earliest convenience.

May 24, 1945

"I would also appreciate an opinion as to whether or not a township may legally issue warrants against anticipated taxes within a given year."

Your first question is whether or not after township expenses have been fully discharged, any surplus funds remaining may be divided among special road districts within such township.

Section 13933, Article 2 of said Chapter 101 defines the powers of townships under township organization, such powers to be administered by and through a board of directors for each township created under the provisions of Section 13976 of Article 9 of said Chapter 101.

The third and fourth subdivisions of said Section 13933 of Article 2 of said Chapter 101, are as follows:

"* * * third, to make such contracts, purchase and hold personal property, and so much thereof as may be necessary to the exercise of its corporate or administrative powers; fourth, to make such orders for the disposition, regulation or use of its corporate property as may be conducive to the interest of the inhabitants thereof; * * *"

Section 13934 of said Article 2 of said Chapter 101 is as follows:

"No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."

Section 26(a) of Article 6 of the New Constitution of Missouri, using almost the exact language of Section 12, Article 10 of the old Constitution of this State, provides:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the

state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

Section 13985 of Article 9 of said Chapter 101, and also Sections 8821 and 8822, Article 17, Chapter 46, prescribe the method to be followed by the township board of directors in levying, collecting and preserving taxes to finance the township affairs. Said Section 13985 requires a different and special levy for road and bridge purposes and special bridge tax, aside from general township funds.

It appears that the whole plan for levying and collecting road and bridge taxes in such townships was separate from general taxes under the terms of the old Constitution and so remains under the new Constitution. Section 11 of Article 10 of the new Constitution sets forth the amount of levy for general purposes of counties and municipalities, according to assessed valuation of property in such counties.

Section 12 of Article 10 of the new Constitution reads as follows:

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or

May 24, 1945

special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law.

"Nothing in this section shall prevent the refund of taxes collected hereunder to cities and towns for road and bridge purposes."

It appears from your letter where it states: "The township also levies and collects a township tax and each year has been accumulating a surplus of funds in this account," the surplus you mentioned as having been accumulated in the township funds is derived from such general township tax levied and collected for township expenses, and not from assessments made for road and bridge purposes for the three special road districts mentioned as existing in this township.

Section 14015, Article 12, Chapter 101, R. S. Mo. 1939, mentioned in your letter as the basis for your first inquiry, provides:

"Sec. 14015. Surplus tax money, how held.-- Whenever any greater amount of taxes shall be assessed in any township than the township charges thereof, and its proportion of tax and county charges, the surplus shall be paid by the collector to the trustee of the township, who shall hold the same until needed to pay township expenses."

The case of Jensen vs. Wilson TP Gentry County, 145 S. W. (2d) 372, was a case construing the township organization statutes. In that case the Court was particularly construing the effect and inviolability of Section 12301, R. S. Mo. 1929, which is our present Section 13978 of Article 9 of said Chapter 101, R. S. Mo. 1939. In holding that the terms of said Section 12301 were mandatory and that no claim could be allowed by the township directors unless it was verified

May 24, 1945

by affidavit, and in holding that all of these township organization statutes were enacted to safeguard the public funds of the township, and that to permit the violation of any of them would be to open the door to fraud, our Supreme Court in its decision, l.c. 374, said of said Section 12301, now Section 13978:

"The terms of the statute are so forceful and explicit as to ward off even any shadow of a doubt about their meaning. It could hardly be more definitely stated that a township board has no authority to allow any claim whatsoever unless 'verified by affidavit.' Requiring such verification of the claim is an additional safeguard to the public funds. The facts stated in support of the claim are confirmed by the affidavit of the claimant. Because of the affidavit, the claim becomes a solemn, formal declaration stated before an officer of the law to be true; it is fortified because of the prohibition against making a false affidavit."

Section 14016, supra, is couched in the same positive language, and its effect is entitled to just as much verity, we believe, as the section the Court was then construing was entitled to and given by the Court.

There are no other powers given to the board of directors or to the trustee of such township respecting the disposition of funds of the township or the special or general road districts within the townships further than those contained in said Chapter 101. We find no authority in said Chapter to permit this surplus funds to be divided among the special road districts within the townships. We think Section 14015 means just what it says, and that the trustee must hold such funds until needed to pay township expenses.

Our Supreme Court has always held consistently that public funds are trust funds, and that their disposition must be authorized by law. The Court has likewise held consistently that officers and bodies politic acting through them take their authority in the handling and disposition of public funds only

May 24, 1945

from the statutes. We find no case in this State where the Court has construed this particular Section 14015, but by analogy we think the decision rendered by Judge Douglas in the Gentry County case is controlling here, and therefore all of the statutes of said Chapter 101, supra, are devised for the protection and preservation of the public funds where the same are mentioned in said statutes.

An analogous case is one growing out of the handling of school funds. This question was treated in the case of Montgomery County vs. Auchley, 103 Mo. 492, where the Court, l.c. 502, said:

"* * * The solution of this question will depend largely upon the power of the county courts in regard to school funds. That they are simply trustees of these funds will not be disputed. All powers they possess in regard to them are derived from the statutes. * * * "

Our Supreme Court in the case of Morrow vs. Pike Co., 189 Mo. 610, l.c. 622, of the same question said:

"* * * It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the lawmaking power in relation to the fund (Ray County to use v. Bentley, 49 Mo., l.c. 242); It may not divert the general county revenue to its protection, and, on the other hand, it can not apply the school fund to the payment of ordinary county debts. * * * "

In the case of Ray County vs. Bentley et al., 49 Mo. 236, l.c. 242, cited in the Pike County case, supra, our Supreme Court held to the same rule in the following language:

"* * * The County is not the owner of the fund; the title is simply vested in it as trustee, for convenience, to carry out the policy devised by the lawmaking power for the appropriation and distribution of the fund. In the

May 24, 1945

care, management and control of the fund, the County Court acts purely in an administrative capacity, not as the agent of the county, but in the performance of a duty specifically devolved upon it by the laws of the State. There is nothing judicial in the exercise of its functions in this respect. The County Court does not derive its powers from the county, and it can exercise only such powers as the Legislature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. * * *

We have found no statute or decision of our Courts giving any authority for the surplus funds of the township mentioned to be divided among the special road districts within the township.

Your second question is whether a township may legally issue warrants against anticipated taxes within a given year.

Referring again to Section 13933 and Section 13976, as defining the powers of townships and the duties of the township board, we find that the townships have the right to make contracts, purchase and hold personal property and to use the same and make such orders for the disposition thereof as may be conducive to the best interest of the inhabitants of the township, and that the board of directors shall audit accounts of the township officer, audit all other accounts or demands legally presented to them, etc.

Section 13983, Article 9, of said Chapter 101 is as follows:

"When any claim or account, or any part thereof, shall be allowed by the township board of directors, they shall draw an order upon the township trustee in favor of the claimant for the amount so allowed-- said order to be signed by the president of said board, and attested by the township clerk and delivered to said claimant."

May 24, 1945

By the terms of the statutes just referred to and quoted, when the township board carries on business for the township the persons with whom such business is transacted may come in at any time, upon filing a claim verified by affidavit, and demand and receive an order or "warrant" in acknowledgment thereof and as evidence that such person is entitled to be paid therefor out of township funds.

The issuing of the warrant or order for the payment of material or services by a township board is merely making a promise in writing to pay. It has been held that a county warrant is to all intents and purposes, a promissory note of the county.

In the case of International Bank of St. Louis vs. Franklin County, 65 Mo. 105, l.c. 112, Judge Sherwood so stating said:

"* * * In short, it is to all intents and purposes the promissory note of the county. * * *"

The same statement of the office and effect of a county warrant was made by the St. Louis Court of Appeals in the case of Steffen vs. Long, 165 Mo. App. 254, l.c. 258, where it is said:

"* * * A warrant is, in legal effect, a promissory note. (International Bank of St. Louis v. Franklin County, 65 Mo. 105.) * * *"

We think the same rules that apply to the effect of issuing and payment of county warrants would apply to township warrants in counties having adopted township organization.

The case of State ex rel. Vaughan vs. Appleby et al., 136 Mo. 408, was a case where the Supreme Court had before it, in construing a statute, a question very similar to the second question propounded here. That was a case also of paying county warrants, but we think it will apply here as a guide, there being no statute prohibiting the township board from so doing.

May 24, 1945

The Court in the Appleby case on this point, l.c. 412, said:

"* * * We must assume that the legislature intended that all just and proper liabilities of the county, created in one year, should be paid out of the revenues and income of that year. The provisions for dividing and apportioning the revenues to be collected for the year into the various funds does not contemplate that a just demand against the county should go unpaid because the revenue appropriated to the particular fund, out of which it is primarily payable, may have been exhausted, if there be money in the treasury unappropriated, or not needed for the purposes for which it was appropriated, from which it can be paid. * * * "

On the same principle our Supreme Court in the case of State ex rel. Bank vs. Johnson, 162 Mo. 621, l.c. 629, in construing a statute respecting the payment of county warrants said:

"It was ruled in Book v. Earl, 87 Mo. 246, that 'the evident purpose of the framers of the Constitution and the people who adopted it was to abolish in the administration of county and municipal government, the credit system, and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year.' But it was at the same time said: 'Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.' "

May 24, 1945

If then the township may under the above statutes contained in said Chapter 101 contract indebtedness within any year's estimated income, and it may do so under the terms of our Constitution above quoted, and under the township organization statutes; and if it is the right of a claimant to have the order or "warrant" issued for his services or contractual relations of furnishing material or otherwise, and by the terms of Section 13983 he is so entitled, there would seem to exist the right on the part of the township directors to issue such warrants against the anticipated taxes within that year, under the above statutes and authorities cited.

CONCLUSION.

It is, therefore, the opinion of this Department:

1) That if after township expenses have been paid by a township in counties having adopted township organization, there remains a surplus of taxes accumulated from a general township levy, such surplus funds may not be divided among the special road districts within the township, but such surplus must be held by the trustee of the township until needed to pay township expenses, and,

2) That a township in counties having adopted township organization may, in any year, legally issue warrants against anticipated taxes for that given year, provided they do not issue warrants in excess of such estimated taxes for such year.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney-General

APPROVED:

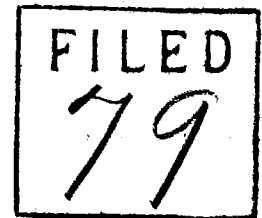
J. E. TAYLOR
Attorney-General

GWC:ir

DRAINAGE DISTRICT FUNDS:

Drainage District funds may not be invested in United States securities or any other securities.

July 26, 1945



Honorable Theo. R. Schneider
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Mr. Schneider:

This will acknowledge your letter of June 28, requesting an opinion from this Department whether a drainage district may invest surplus funds temporarily in United States securities.

Your letter states:

"Drainage District No. 1 of Bates County, Missouri has accumulated surplus funds which have been derived from taxation and were raised for maintenance purposes but which funds they have been unable to use because of the current labor shortage. The question has arisen whether or not such surplus funds can be invested in United States securities until such time as the labor situation eases and the money can be used for the maintenance purposes for which the taxes were levied.

"I would appreciate an opinion of your department concerning such an investment."

Chapter 79, consisting of Articles 1 to 12, inclusive, constitutes the law of this State respecting drainage districts.

Section 12348 of Article 1, Chapter 79, providing for a treasurer for a drainage district, and setting forth his duties states in part, as follows:

July 26, 1945

"The secretary of the board of supervisors in any drainage district shall hold the office of treasurer of such district, except as otherwise provided herein, and he shall receive and receipt for all the drainage taxes collected by the county collector or collectors of revenue, and he shall also receive and receipt for the proceeds of all tax sales made under the provisions of this article. * * *

* * * * *
Said treasurer shall keep all funds received by him from any source whatever deposited at all times in some bank, banks or trust company to be designated by the board of supervisors. All interest accruing on such funds shall, when paid, be credited to the district. It shall be the duty of the board of supervisors to audit or have audited the books of said treasurer of said district each year and make report thereof to the landowners at the annual meeting and publish a statement within thirty days thereafter, showing the amount of money received, the amount paid out during such year, and the amount in the treasury at the beginning and end of the year, and file a copy of such statement in the office of the county clerk of each county containing land embraced in the district. The aforesaid treasurer of the district shall pay out funds of the district only on warrants issued by the district, said warrants to be signed by the president of the board of supervisors and attested by the signature of the secretary and treasurer. * * * "

Careful inspection and reading of the twelve articles of said Chapter 79, fail to disclose any authority giving the board of supervisors or the treasurer of any

July 26, 1945

drainage district the right to pay out the funds of such drainage district otherwise than is provided in said Section 12348. Said Section requires the treasurer to keep all funds, received by him from any source whatever, deposited at all times in some bank, banks or trust company to be designated by the board of supervisors. That part of said Section is mandatory, and such funds may not be used for any purpose except in the discharge of the obligations of the district in its regular course of business.

Respecting the duties and authority, in their custody of and accountability for the funds of the district, of supervisors, or commissioners as they are sometimes called, and other officers of a drainage district, 19 C. J., page 632, states the following text:

"The duties of drainage commissioners and other officers are such as are prescribed by statute. Drainage officers are required to account for funds collected and distributed by them. The treasurer of the district is the custodian of its funds, and is authorized to pay them out only upon warrants issued by the directors of the district.
* * * "

The same volume, 19 C. J., page 761, respecting the disposition of a drainage district fund, in the following text states:

"Statutory provisions as to the disposition of funds derived from assessments must be complied with. Such funds cannot be diverted from the purpose for which the assessment was levied, and drainage officers are liable for misapplication thereof.
* * * "

Drainage district funds are regarded, as are all other public moneys, by the lawmakers and the courts as trust funds. The strictness with which the courts have said public officers must be held to an account in their custody and disbursement of public funds has been often expressed by our Supreme Court, with respect to school funds. By analogy, the decisions of our Supreme Court

July 26, 1945

respecting the handling of school funds would apply in like manner to the handling of drainage district funds.

In the case of Saline County et al. v. Thorp et al., 88 S.W. (2d) 183, l.c. 186, on this question our Supreme Court said:

"* * * It must be remembered that this is a case where public officers were acting for a governmental subdivision of the state, a county, in relation to funds held in trust for the public for school purposes. Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but as special trustees with every limited authority, and that every one dealing with them must take notice of those limitations. Montgomery County v. Auchley, 103 Mo. 492, 15 S.W. 626."

The Supreme Court made the same ruling in the case of Montgomery County v. Auchley, 103 Mo. 492, l.c. 502, where the Court said:

"* * * The solution of this question will depend largely upon the power of the county courts in regard to school funds. That they are simply trustees of these funds will not be disputed. All powers they possess in regard to them are derived from the statutes. * * * "

In the case of Lamar Township v. City of Lamar, 261 Mo. 171, l.c. 189, respecting the rights and duties of public officers in their custody and disbursement of public funds, our Supreme Court said:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow

July 26, 1945

their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. * * *

In the case of State ex rel. vs. Hackman, et al., 276 Mo. 110, 1.c. 116, our Supreme Court on the same point, said:

"* * * For it is fundamental that no officer in this State can pay out the money of the State except pursuant to statutory authority authorizing and warranting such payment. * * *

In the case of Cantley vs. Little River Drainage District, 2 S. W. (2d) 607, our Supreme Court was considering a case where the Little River Drainage District had loaned its funds, without any statutory authority so to do, to a bank. The bank failed, and was liquidated by S. L. Cantley, Commissioner of Finance of the State of Missouri. The Commissioner of Finance filed this suit in two counts, one in replevin to recover certain notes that the bank had pledged to secure the funds it had borrowed from the drainage district.

The second count asserted a cause of action for money had and received.

The suit was based upon the assertion that the bank was without authority to pledge the notes as collateral because the drainage district had no statutory authority to lend its funds to the bank.

The Court did not directly hold that the Little River Drainage District had no statutory authority to lend its funds to the bank in question, but the effect of the holding of the Court in the case is that in lending the district's funds to the bank it acted ultra vires; that the

July 26, 1945

bank could not take advantage of it because the drainage district had fully executed the contract of the loan, and that the bank was estopped to plead ultra vires on the part of the drainage district. The Court in discussing the case, l.c. 612, declined to make a definite holding whether the district had the right to lend its funds or not, but the Court did say the following:

"* * * But it is not necessary to discuss the right of the district to loan their funds and take security therefor, because the bank, receiving the loan and using the money, could not well say that the district could not make a loan.

"We conclude that this transaction was a loan to the bank, and a loan negotiated and made by such bank through its board of directors, and that the notes held by the drainage district were hypothecated by the bank through its board of directors, and the bank, as well as the state commissioner of finance, is bound by the contract of loan made with the drainage district. In other words, the commissioner of finance cannot disavow a legal and binding contract made by the bank before its failure.

"What we have said, supra, disposes of the case. However, there is another theory of the law which just as effectively disposes of the case. That the bank got the benefit of the funds of the drainage district is uncontroverted. The contract was fully executed by the drainage district, and in such case, ultra vires, even if pleaded, cannot be successfully invoked. * * * "

It is, we think, fair to assume that the Court would have declared outright that the drainage district named had no right to lend its funds, had the district not been at such great disadvantage with the bank. That, we think, is the spirit and the result expressed and intended by the Court in its decision.

The terms of Section 12348, supra, positively

July 26, 1945

require all of the funds of a drainage district to be kept at all times in the depository selected by the supervisors, and permits such funds to be paid out only as specified in said section. This Section, we believe, standing alone, would be a bar to a drainage district in lending its funds, or in investing its funds in United States securities or any other kind of securities.

So, also do we think that the ultimate holding in the Cantley case, supra, is a conclusive disapproval by our Supreme Court upon the act of a drainage district in lending its funds. If the decision does so hold, and we believe it does, it would also prohibit a drainage district from investing its funds in United States securities. There is no statutory authority given to the officers of a drainage district to invest its funds, surplus or otherwise, in securities of any kind. Such authority must be provided by statute before such investment would be lawful.

CONCLUSION.

It is, therefore, the opinion of this Department that Drainage District No. 1 of Bates County, Missouri, having accumulated surplus funds which have been derived from taxation, and raised for maintenance purposes, but which funds they have been unable to use because of the current labor shortage, has no statutory authority so to do, and may not invest such surplus in United States securities until such time as the labor situation eases and the money can be used for maintenance purposes for which the taxes were levied, nor for any other period of time, nor for any other purpose whatsoever, except as specified in said Chapter 79, R.S. Mo. 1939.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:lr

LINCOLN UNIVERSITY: Re: The provision in House Bill #361 passed by the 63rd General Assembly does not restrict the use of money appropriated for the tuition of students in out-state institutions to those institutions which are tax-supported

August 20, 1945



Mr. Sherman D. Scruggs
Acting Secretary, Board of Curators
Lincoln University
Jefferson City, Missouri

Dear Mr. Scruggs:

We have your letter of August 13, 1945, in which you request an opinion of this department regarding the use of funds appropriated in House Bill #361 for the payment of tuition and other fees of negro students, who are residents of the State of Missouri, in out-state institutions of higher education, such tuition arrangements being pursuant to Section 10779, R.S. Mo., 1939. Pointing out that House Bill #361 limits the use of the funds appropriated to tuition and other fees in tax-supported institutions of other states, your request reads as follows:

"2. The Curators seeks an opinion from the Attorney General as to whether those students who are already pursuing courses in the non-tax-supported institutions may continue their courses to completion with the use of the funds provided under this measure and also that those students whose attendance at such institutions has already been arranged for to begin in September, 1945, may also be permitted to use the fund for such attendance."

As stated in your letter, Section 10779, R.S. Mo., 1939 reads as follows:

"Pending the full development of the Lincoln University, the Board of Curators shall have the authority, if and when any qualified negro resident so requests, to arrange for his attendance at a college or university in some other state to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at the Lincoln University, and to pay the reasonable tuition fees for such attendance."

August 20

The pertinent provision of House Bill #361, as truly agreed to and finally passed, reads at page 24, as follows:

"Section 2. There is hereby appropriated out of the State Treasury for Lincoln University payable out of the General Revenue fund for the year beginning July 1, 1945 and ending June 30, 1946 the sum of Twenty Thousand Dollars (\$20,000.00) for the payment of tuition and other student fees of negro residents of the State of Missouri at any tax supported institution of higher education of any other state where the Board of Curators of Lincoln University shall have arranged for the attendance of such students to take any course or to study any subjects provided for at the State University of Missouri, and which are not taught at Lincoln University."

Section 23, Article III, Constitution of 1945, reads as follows:

"No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

Legislation of a general character cannot be included in an appropriation bill. State ex rel. Gaines vs. Canada (1937) 113 S. W. (2d) 783, 342 Mo. 121; State ex rel. Davis vs. Smith (1934) 75 S. W. (2d) 828, 335 Mo. 1069; State ex rel. Mueller vs. Thompson (1926) 316 Mo. 272, 289 S. W. 338.

In State ex rel. Gaines vs. Canada (1937) 342 Mo. 121, the Supreme Court of Missouri had before it the question of whether an appropriation Act, providing funds for the payment of tuition fees for attendance of negro students at the University of any adjacent state, could provide that the total amount paid should not exceed the difference between the registration and incidental fees charged by the University of Missouri to resident students

August 20, 1945

and the school attended for similar courses. The question in the case was whether the proviso as to the maximum amount which could be paid was constitutional under Section 28 of Article IV of the Constitution of 1875, which provided as is provided in Section 23 of Article III of the Constitution of 1945, that no bill shall contain more than one subject which shall be clearly expressed in its title. The court held said proviso unconstitutional and that legislation of a general character cannot be included in an appropriation bill. The court said, l.c. 136:

* * "The proviso in the 1935 act which attempts to limit the authority of the board of curators to the payment of the difference between the tuition in Missouri and in the adjacent states is unconstitutional and void. A general statute (Sec. 9622, R. S. 1929) authorizes the board of curators of Lincoln University to pay the reasonable tuition fees of negro residents of Missouri for attendance at the university of any adjacent state. This statute cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill. To do so would violate Section 28 of Article IV of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of Section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. (State ex rel. Hueller vs. Thompson, 316 Mo. 272, 289 S. W. 338; State ex rel. Davis v. Smith, 335 Mo. 1069, 75 S. W.(2d) 828.) The valid and invalid portions of the statute are separable. If we disregard the invalid proviso there is left a complete workable statute which appropriates the sum of \$10,000 for the purposes therein named. * * * *"

We think the broad question in the Gaines case was identical with that presented in your letter of August 13, 1945, i.e. whether an appropriation bill could restrict and limit the use of funds by Lincoln University for tuition purposes to certain cases

August 20, 1945

when there was a general statute (Sec. 10779, supra,) regarding the use of the fund which set out the manner in which the tuition was to be paid and in what instances. The only difference between the facts of the Gaines case and those presented at this time, was that at the time the Gaines case was decided, the statute provided that tuition should be paid to schools in "adjacent states," whereas, the present statute provides that said tuition may be paid in "some other state." This difference is not material to the question involved and does not affect the application of the Gaines case to the present statute.

The title of House Bill #361 shows it to be an appropriation bill and an appropriation bill only. However, in Section 2 of the bill, at page 24, it attempts to limit the use of the funds for tuition of negro students in outstate institutions to tax-supported institutions. It thus attempts to pass general legislation regarding the use to which the fund is to be put and therefore, attempts to pass general legislation in an appropriation bill.

General legislation cannot be included in an appropriation bill for the reason that such an inclusion violates the Constitutional provision against including more than one subject in a legislative enactment. State ex rel. Gaines, supra; State ex rel. Davis vs. Smith, supra; State ex rel. Hueller vs. Thompson, supra.

While the above cases were decided under the Constitution of 1875, that Constitution contained the identical provision now found in Section 23, Article III, Constitution of 1945, and these cases are thus controlling in interpreting Section 23, Article III of the Constitution of 1945.

We think, therefore, that that portion of House Bill #361 limiting the use of the tuition funds to "tax-supported" institutions is void as violative of Section 23, Article III of the Constitution of 1945.

The question which then arises is whether the entire section appropriating funds for tuition is invalid or merely that part limiting the use of such funds to provide tuition at tax-supported institutions.

The law is well settled in this state that, although a statute may be invalid or unconstitutional in part, the part that is valid will be sustained where it can be separated from the part which is void. State ex rel. Hueller vs. Thompson, supra;

State ex rel. vs. Bigger (1944) 178 S. W.(2d) 347; State ex rel. vs. Taylor (1909) 224 Mo. 474; State ex rel. vs. Gordon (1911) 236 Mo. 142; State ex inf. vs. Washburn (1902) 167 Mo. 680. It is held that the void portion is separable if, (1) when the unconstitutional portion is stricken out, that which remains is complete and capable of execution and, (2) the context indicates the Legislature intended the provision to be considered as a whole and would not have enacted the residue independently of the void portion.

Measured by these canons of law, we think the void portion of the section regarding funds for tuition is separable from the rest of the bill. The words "tax-supported" can be removed from Section 2 of the Act and the section then reads in such a manner as to be in substantial accord with the provision of Section 10779, R. S. Mo. 1939. It is complete and logical, and capable of execution. Thus, the section can and does stand independently after the void portion is removed.

There is no valid reason for assuming that the Legislature would not have passed the Act without the void portion of Section 2. In State ex rel. vs. Gordon, supra, the court, in discussing the question of whether the Legislature would have passed an appropriation Act for a game and fish protection fund without a provision that none of the money should be available "so long as the present state game and fish commissioner remains in this office or is in anywise with the office of State Game and Fish Commissioner, except the salaries and accounts due at the time of the approval of this Act," said that the fact that the State Game and Fish Commission was an important department of the State and it was necessary that funds be provided therefor, should be considered in determining whether the Legislature would pass a bill without the void portion relating to the present Game and Fish Commission. The Court said, l.c. 172:

"* * *The questions are thus presented whether the proviso was the inducement for making the appropriation and whether the belief is warranted that the Legislature would not have made the appropriation had it known that the proviso would not be carried into effect.

"In the consideration of these questions great influence must be given to the duty of the Legislature to make provision for the support of the public institutions of the State. One of the first and

most important questions confronting every form of organized government is that of raising and supplying the necessary funds to meet the legitimate expenses of government, including the support of those public institutions which enlightened sentiment has deemed essential to the general well-being of the people. Under the genius of our system of government and that from which it was evolved, this function has always been regarded as peculiarly within the province of the lawmaking body. And under our State Constitution the necessity for making such provision for carrying on the government of the State, more than any other one cause, makes imperative the biennial convening of the General Assembly.

"There are many reasons why the Forty-Sixth General Assembly must have recognized the importance to the people of the State of making provision for the support of the game department, and the fact that it did appropriate the sum of ninety thousand dollars therefor clearly shows that it did not underestimate the full import of that duty.* * *"

The Court held the provision did not invalidate the entire appropriation.

It is as necessary to provide funds for educational purposes as for fish and game purposes. The one is as much an essential duty of the State as the other. We are, therefore, of the opinion that the portion of House Bill #361 limiting the use of the funds to tax-supported institutions is separable from the remaining portion of Section 2 of that bill.

CONCLUSION

It is, therefore, the opinion of this department that the

Mr. Sherman Scruggs

-7-

August 20, 1945

moneys provided for in House Bill #361, passed by the 63rd General Assembly, may be used for the payment of the tuition of negro residents of the State of Missouri who have been attending, or will attend, in the coming term, institutions of higher education in any other state even though such institutions are not tax-supported.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

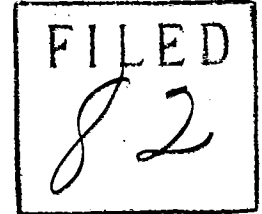
APPROVED:

J. E. TAYLOR
Attorney General

SNC:mw

ELECTIONS: Judges and clerks appointed to serve at the special election to be held Feb. 27, 1945, on the question of adopting a new Constitution, can also serve in the same capacity at a special election to fill the office of State Senator to be held in Adair, Macon and Shelby Counties on the same date.

February 12, 1945



Honorable William E. Shirley
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

Reference is made to your letter of February 10, 1945, reading as follows:

"In this county, on February 27, 1945, we have an election to elect a State Senator to fill the vacancy caused by the resignation of Mr. Briggs. Also on the same day, it is the election on the new Constitution.

"Will you kindly advise me if the same judges in one election can act in the other?"

The manner of holding the special election submitting the proposed Constitution of Missouri to the electors is provided by Section 1 of an Ordinance adopted by the Constitutional Convention on its 215th day. The pertinent parts thereof read as follows:

"The proposed new Constitution * * * shall be submitted to the electors of the State for approval or rejection, at a special election to be held for that purpose on Tuesday, February 27, 1945. * * * Said election shall be held and said qualified electors shall vote at the usual places of voting at general elections in the several counties of this State, including the City of St. Louis; and, except as herein otherwise provided, said election shall be conducted and returns thereof made according

to the laws in force on said date regulating general elections; provided, that it shall not be necessary to hold said election with booths for the voters, and that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two Parties which cast the highest and next highest number of votes for Governor at the last general election. * * *

The special election for the election of a State Senator from the Ninth Senatorial District to fill the vacancy created by the resignation of the Honorable Frank P. Briggs, has been called by the Governor under the provisions of Section 14 of Article IV of the Constitution of Missouri. The manner of holding such election is provided by Chapter 76, Revised Statutes of Missouri, 1939. In view of the proviso found in the portion of the Ordinance quoted above, we feel that attention should be directed to the following parts of the Chapter mentioned:

"Sec. 11300. All officers upon whom is imposed by law the duty of designating the polling places, shall provide in each place designated by them a sufficient number of places, booths or compartments, which shall be furnished with such supplies and conveniences as shall enable the voter conveniently to prepare his ballot for voting, in which compartment the electors shall mark their ballots, * * *"

"Sec. 11499. In all counties in this state, four judges of election shall be appointed by the county court for each election precinct in each of said counties; * * *"

"Sec. 11501. In all precincts in this state that at the last preceding general election cast two hundred or more votes, at the same

time and in the same manner as judges of election are appointed or elected, two additional judges of election for each such election district in the state shall be appointed or elected; * * *

"Sec. 11504. In all precincts casting less than two hundred votes in the last general election, the judges shall appoint two clerks, and in all precincts casting two hundred or more votes in the last preceding general election, the judges shall appoint four clerks. * * *

It is apparent that no conflict need arise in the conduct of the elections, as both are to be held in accordance with the statutes relating to general elections, except to the extent change is made by the proviso found in the above quoted Ordinance. We believe that such proviso was incorporated solely as a measure to reduce the expense incident to holding the election, and that it is not a limitation on the total number of judges that might validly be appointed.

CONCLUSION

In the premises, we are of the opinion that an otherwise eligible person can serve as judge or clerk in both elections. It is our further opinion that the county court may appoint the number of judges required for each voting precinct, such number having been determined as provided in Sections 11499 and 11501, and designate them as judges of both the election on the question of the adoption of the new Constitution for Missouri and for the filling of the office of State Senator. In addition, the county court should appoint for each voting precinct two clerks of the election on the question of the adoption of the new Constitution for Missouri, selected according to the provisions of the Ordinance. The total number of clerks of the election for the filling of the office of State Senator will be determined in each voting precinct in accordance with the provisions of Section 11504,

Honorable William E. Shirley

-4-

February 12, 1945

and will be appointed by the judges of election of such voting precinct, who may, at their discretion, include in such number and appoint the same persons previously selected by the county court as the clerks of the special election on the question of the adoption of the new Constitution for Missouri. Booths must be provided for the balloting on the Senatorial candidates, as provided by Section 11600.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

WFB:HR

CORPORATIONS: Products of foreign corporations may be subject to state inspection laws although sold in interstate commerce.

FILED

82

December 6, 1945

17/18

Honorable Sam B. Shirky
Associate Dean
University of Missouri
Columbia, Missouri

Dear Sir:

We are in receipt of your request under date of November 24, 1945, in which you seek the opinion of this office on a question presented to you in an enclosure to your letter written by a corporation licensed to do business in another state. That letter is as follows:

"We are in receipt of your bulletin on the Missouri Law relating to the sale of commercial fertilizers and we are in doubt as to its interpretation of the law as it pertains to us.

"We contemplate marketing a fertilizer of 4-12-4 formula under our own brand name, direct to the consumer, which will be the cemeteries in the State of Missouri.

"We have recently received information from other States that since we are marketing direct to the consumer, it will be unnecessary for us to obtain a license to market in those states, under these conditions. However, we must file with their state the type of product and the manner in which we intend to market. Since this is true, in some of the other States, we are wondering as to whether or not this same thing applies in the State of Missouri. We would appreciate clarification on this subject."

The law referred to in the above request is Article 14, Chapter 102, R. S. Mo. 1939. The pertinent sections of that article are as follows:

Sec. 14251. "Any commercial fertilizer or material to be used as a fertilizer, the selling price of which exceeds five dollars per ton, shall have stamped or affixed to each package of such fertilizer, in a conspicuous place on the outside thereof, by the manufacturer, importer, corporation, company or person who sells or causes the same to be sold, offered or exposed for sale, a plainly printed statement which shall certify as follows:

"(1) The name, brand or trade-mark under which the fertilizer is sold.

"(2) The name or address of the manufacturer of the fertilizer.

"(3) The guaranteed chemical composition of the fertilizer expressed in the following terms: (a) Per centum of nitrogen; (b) per centum of available phosphoric acid, and in the case of an undissolved animal bone, the per centum of insoluble phosphoric acid; (c) per centum of potash soluble in distilled water. In case the composition is expressed in equivalent to ammonia, etc., in addition to the above, it shall be clearly and unequivocally shown that such terms are used merely as equivalents and not used to represent additional plant food."

Sec. 14252. "Before any commercial fertilizer or material to be used as a fertilizer, the selling price of which exceeds five dollars per ton, is sold, offered or exposed for sale in this state, the manufacturer, importer, corporation, company or person who sells or causes the same to be sold, offered or exposed for sale, shall file annually for registry with the Missouri agricultural experiment station at

Columbia, a statement which shall certify as follows:

"(1) The name, brand, or trade-mark under which the fertilizer is sold;

"(2) the name and address of the manufacturer of the fertilizer;

"(3) the guaranteed chemical composition of the fertilizer, expressed in the following terms: (a) Per centum of nitrogen; (b) per centum of available phosphoric acid, and in the case of an undissolved bone, the per centum of insoluble phosphoric acid; (c) per centum of potash soluble in distilled water."

Sec. 14255. "Every manufacturer, importer or person shall pay to said experiment station for the labels or tags required by them under section 14254 of this article, the sum of one-half cent each for tags or labels to be attached to packages weighing ten pounds or less; the sum of one cent for tags or labels to be attached to bags or packages weighing more than ten pounds and not more than fifty pounds; the sum of one and one-half cents for tags or labels to be attached to bags or packages weighing more than fifty pounds and not more than one hundred pounds; and three cents each for tags or labels to be attached to bags or packages weighing more than one hundred pounds and not more than two hundred pounds, and when fertilizers are shipped in bulk there shall be attached one tag costing three cents for each two hundred pounds thereof. The money so paid shall be used for defraying the expenses of said experiment station in registering and keeping a registry of the statements required under section 14252 of this article, for collecting samples in the open market, for making or causing to be made the analysis of samples for supplying the labels or tags, for practical and scientific experiments in the value and proper use of commercial fertilizers, and for publishing the

results of same and for such other work, investigations and publications as may be of practical use to the farmers of the state."

Sections 14256 and 14257 require the director of the agricultural experiment station to cause to be collected from the open market samples of all brands of fertilizer sold in the state during the year, and to cause to be made a chemical analysis of such samples.

Section 14258 prohibits the sale of certain types of fertilizer unless a plainly printed statement of such fact be affixed to every such package.

Section 14259 makes a violation of any of the provisions of the article a misdemeanor.

The corporation forwarding the request apparently doubted the application of this law to their product on the ground that, since it was being sent from outside the state to a consumer within this state, it was a transaction in interstate commerce, and for that reason exempt from legislation enacted by this state.

The provision of the Constitution of the United States which might bear on the question at hand is clause 3 of Section 8 of Article I, which provides:

"The Congress shall have power: * * *

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; * * *"

While the above section does constitute a grant of power to the Federal Government to control commerce between the states, the courts have continuously recognized the rule that the states retained as a part of their general police powers the right to protect the health, safety and morals of the citizens of the states. By the enactment of nondiscriminatory laws which have as their object such protection, such laws are valid, even though they may incidentally constitute a burden on interstate commerce, if fraud or imposition are prevented thereby.

A law very similar to the Missouri law set out above was involved in *Patapasco Guano Co. v. Board of Agriculture of North Carolina*, 42 L. Ed. 191, 171 U. S. 345, a decision by the United States Supreme Court. In that case a statute of North Carolina required that every bag, barrel or other package of fertilizer offered for sale must have affixed thereto a label or stamp setting forth the name, location and trademark of the manufacturer, the chemical composition of the contents, and the real percentage of certain specified ingredients. A further provision required an agricultural experiment station connected with the University of North Carolina to employ a skilled chemical analyst whose duty it was to obtain samples and analyze samples of commercial fertilizer obtained on the open market. Further provision required the manufacturers of such products to pay a charge of twenty-five cents per ton on such fertilizers for each fiscal year, and penalties were provided for noncompliance with the act. It can readily be seen that these statutes were almost identical with our own, even as to the charge for inspection.

The law was attacked on the ground that it violated the third clause of Section 8 of Article I, *supra*, that the charge to be paid was so excessive that it could not be sustained as a legitimate inspection law or as a valid exercise of the police power, and because it did not relate to the health, morals or safety of the community. In rejecting these claims, the opinion stated, 1. c. 195, 196 (L. Ed.):

"Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within, a state.

* * * * *

"Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one state

into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power.

"No doubt can be entertained of this where the inspection is manifestly intended, and calculated in good faith, to protect the public health, the public morals, or the public safety. *Minnesota v. Barber*, 136 U. S. 313, (34:455, 3 Inters. Com. Rep. 185). And it has now been determined that this is so, if the object of the inspection is the prevention of imposition on the public generally.

* * * * *

"Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the state to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope.

* * * * *

"The act of January 21, 1891, must be regarded, then, as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the state, and the charge of 25 cents per ton as intended merely to defray the cost of such inspection. It being competent for the state to pass laws of this character, does the requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section 10

of article 1 expressly recognizes the validity of state inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must apply to interstate commerce. In any view, the effect on that commerce is indirect and incidental, and 'the Constitution of the United States does not secure to anyone the privilege of defrauding the public.'"

There are many other decisions to the same effect cited in the above case. In *Savage v. Jones*, 56 L. Ed. 1183, 225 U. S. 501, a law enacted by the State of Indiana, very similar to the Missouri fertilizer law, but applying to commercial livestock feed, was under attack because of a supposed conflict with the Federal Constitution as it related to interstate commerce. In sustaining the validity of the act, the court said, 1. c. 1191 (L. Ed.):

"The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals,--a matter of great importance to the people of the state. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but, without discrimination, sought to promote fair dealing in the described articles of food. The practice of selling feeding stuffs under general descriptions gave opportunity for abuses which the legislature of Indiana determined to correct, and to safeguard against deception it required a disclosure of the ingredients contained in the composition. * * * *

" * * * But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. * * * "

Honorable Sam B. Shirky - 8

The latter case intimates that legislation by Congress concerning the interstate shipment and sales of fertilizer might affect the validity of state laws on the same subject, and it is mentioned for that reason. A search of federal legislation fails to disclose any such enactment, although legislation has been passed on a variety of other products.

CONCLUSION

In view of the above authorities, it is our opinion that commercial fertilizer manufactured outside the State of Missouri and sold within the state is subject to the provisions of Article 14, Chapter 102, R. S. Mo. 1939, even though such sales are made and the products delivered in interstate commerce.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

TAXATION: : Levy may be made by County Court
ROAD DISTRICT: : up to fifty cents on one hundred
SPECIAL BENEFIT DISTRICTS: dollars valuation when authorized
: by a majority of the qualified
: voters of the road district, under
: the provision of Sec. 23 of Art. X
: of the Constitution.

January 23, 1945

FILED

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

This will acknowledge receipt of your letter of January 17, 1945, making request for an opinion of this department as follows:

"In view of the decision in State vs. Southwestern Bell Telephone Company, 179 S.W. (2d) 77, holding that 'that part of Sec. 8716 RS 1939 authorizing the commissioners to make an unlimited levy as therein provided for general purposes in the district as therein specified, is in conflict with Sec. 23, Article 10 of the Constitution and is void.' I would like your opinion as to what procedure should be followed by a road district in levying taxes for the purposes set forth in that section."

The case of State ex rel. vs. Southwestern Bell Telephone Company, 179 S.W. (2d) 77, decided by the Supreme Court on April 3, 1944, held that the portion of Section 8716, R.S. Mo. 1939, authorizing commissioners to make a levy for general purposes in the district was in conflict with Section 23, Article X of the Constitution and was void. This Supreme Court decision specifically mentions an opinion of the Office of the Attorney General of April 7, 1942, addressed to the County Clerk of Atchison County, and a copy of that opinion is herewith enclosed to you.

Honorable Wayne V. Slankard -2- January 23, 1945

As stated in that opinion, taxes for general purposes in road district may only be levied in conformity with the provisions of Section 23, Article X of the Constitution.

CONCLUSION.

From the foregoing, it is the opinion of this department that the procedure necessary to be followed by special benefit road district in the levying of taxes for general purposes must be in compliance with Section 23, Article X of the Constitution, which provides that the County Court shall make the levy when authorized by a majority of the qualified voters of the road district, voting thereon at an election held for such purpose. The tax levy must not exceed fifty cents on the one hundred dollars valuation on all property within such district. The County Court must submit the proposition to a vote within twenty days' time after the filing of petition signed by not less than ten qualified voters and taxpayers residing within such road district.

Respectfully submitted,

R. WILSON BARROW
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

RWB:ir
enc:ll

COUNTY COURT: May expend county funds to repair and con-
COUNTY BUDGET: struct bridges in special road districts, but
only out of Class 6 of the County Budget Law.

January 24, 1945

Mr. Forrest Smith
State Auditor
Jefferson City, Missouri

1-27



Dear Sir:

Recently you requested an opinion upon the following:

"We request an official opinion as to whether or not the county court has authority to appropriate money out of county revenue funds under section 8688 R. S. Mo., 1939, to be used in special road districts and if so to what class of the budget should the appropriation be made."

Section 8688, R. S. Mo. 1939, is a portion of Article 10, Chapter 46. The article provides for the establishment, management and authority for special road districts, commonly denominated "eight mile special road districts." The pertinent portion of Section 8688 is as follows:

"* * * Provided, however, that the county court of the county in which said special road district is located may, in its discretion, out of the funds available to it for that purpose, construct, maintain, or repair, any bridge, or bridges, or culvert or culverts in such road district, or districts, or it may, in its discretion, appropriate out of the funds available for that purpose money to aid and assist the commissioners of said special road district, or districts, which shall be expended by the commissioners of said special road district, or districts, as above provided."

The Supreme Court of Missouri, in the case of State ex rel. Moberly Special Road District v. Burton, 182 S. W. 746, 266 Mo. 711, held the above section to be a valid enactment and specifically ruled that the above quoted portion of the statute, which authorizes county courts to appropriate county funds to the district, was likewise effective. In the above decision the following language is found (266 Mo. 1. c. 722):

"The power of the Legislature in the creation of municipalities and public corporations of every description is not only absolute but unlimited in the absence of constitutional inhibitions. In the presence of this power we must presume that in the creation of the special road districts the Legislature deemed them necessary, expedient and in the public interest. Thus formed, authority exists as a necessary consequence of legislative power, to provide means for their perpetuation or maintenance or their change or abolition, as in the wisdom of the Legislature seems best. (Harris v. Bond Co., 244 Mo. 664.)"

That portion of the County Budget Act which applies to counties under 50,000 inhabitants (Section 10911, Laws of 1941, p. 650) specifically removes roads and bridges in any special road district from Class 3. Roads and bridges in special road districts are not mentioned in any other classification.

On June 21, 1933, this Department ruled that county courts may pay the expense of constructing, maintaining and repairing bridges in this type of special road districts, but only out of funds appropriated to Class 6. That opinion is specifically adopted and a copy is hereto attached.

CONCLUSION

In the opinion of this Department, while a county court may, in its discretion, appropriate county funds for the construction, maintenance or repair of bridges and culverts in the special road districts to which Section 8688, R. S. Mo.

Mr. Forrest Smith

-3-

Jan. 24, 1945

1939, applies, such expenditures may be made only from the funds set aside in Class 6 of the County Budget.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney General

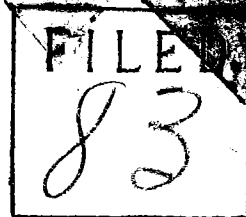
APPROVED:

J. E. TAYLOR
Attorney General

VCT:CP

PROBATE COURTS: When stenographic services may be
STENOGRAPHIC SERVICES: provided; same person may act as
clerk in probate court and stenog-
rapher if services as clerk are
paid for by probate judge himself.

February 19, 1945



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for
an opinion upon the following question:

Can a probate judge employ the same per-
son as clerk of his court and as stenog-
rapher in his office, and pay said person
for her duties as clerk out of his own
funds and cause such person to be paid
for her duties as stenographer by the
county?

Under Section 2440, R. S. Mo. 1939, a probate judge
is required to act as his own clerk unless he elects to
appoint a clerk and pay such clerk himself. Said section
reads, in part, as follows:

"The judge of probate is required to act
ex officio as his own clerk, and give
bond in like amount, with like conditions
and penalties, to be approved by the
judges of the county court, filed and re-
corded, the same as is required of clerks
filling said office by appointment: Pro-
vided, that any judge of probate may, by
an entry of record in said court, appoint
a separate clerk, who shall be paid by
said judge and shall hold his office at
the pleasure of the judge. * * * "

February 19, 1945

There is no statute authorizing a probate court to appoint or employ a stenographer, nor is any specific provision made by statute for the employment of a stenographer for a probate court by anyone. If any authority exists for the employment of a stenographer for the probate court, such authority must be found in the general or implied powers granted to the county court.

Article VI, Section 36, of the Constitution of Missouri provides as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. * * *

In State ex rel. v. McElroy, 309 Mo. 595, 274 S. W. 749, 751, the Supreme Court, in discussing the foregoing constitutional provision, said:

" * * * Other business may be added to its jurisdiction by law, but no law can take from it that which the Constitution expressly gives; i. e., that it shall transact all county business. * * *

In said case the court also quoted with approval the following citations of authority:

"Except as otherwise provided by law, a board of county commissioners or county supervisors ordinarily exercises the corporate powers of the county. It is in an enlarged sense the representative and guardian of the county, having the management and control of its property and financial interests, and having original and exclusive jurisdiction over all matters pertaining to county affairs. Within the

February 19, 1945

scope of its powers, it is supreme, and its acts are the acts of the county. While acts outside their statutory powers are without validity, yet, within the limits of the jurisdiction conferred on them by law, county boards have a wide, or at least a reasonable, discretion, and courts will not interfere with such boards in the lawful exercise of such jurisdiction, on the sole ground that their actions are characterized by lack of wisdom or sound discretion; it being permissible for equity to interfere only in cases of fraud or a clear abuse of discretion. * * *

* * * * *

"In defining the phrase 'county affairs' the court said in *Hankins v. Mayor*, 64 N. Y. 22: 'County affairs are those relating to the county in its organic and corporate capacity, and included within its governmental or corporate powers.'"

In the case of *Rinehart v. Howell County*, 348 Mo. 421, 153 S. W. 2d 381, the court held that a prosecuting attorney was entitled to be reimbursed for the reasonable and actual expenditures he had made for stenographic services where it was shown that such expenditures were for indispensable expenses of his office. In that case the court said:

"So far as presented for review, the record, viewed in the light of the judgment for respondent, is to be considered as establishing that the expenditures for which respondent asked reimbursement were for indispensable outlays for stenographic services incurred in the discharge of his official duties. Appellant offered no evidence and its brief does not question the probative value of respondent's testimony tending to establish said fact. * * *

February 19, 1945

The instant case was submitted on the theory, as disclosed by the stipulated facts and undisputed testimony, that the outlays, as contradistinguished from income, were bona fide, reasonable and actual expenditures for indispensable expenses of the office by respondent (not on the theory that compensation to an officer was involved) and falls within the ruling in *Ewing v. Vernon County*, 216 Mo. 681, 695, 116 S. W. 518, 522(b)."

In discussing the case of *Ewing v. Vernon County*, cited in the above quotation, the court said:

"That case quoted with approval a passage from 23 Am. and Eng. Ency. Law, 2d Ed., 388, to the effect that prohibitions against increasing the compensation of officers do not apply to expenses for fuel, clerk hire, stationery, lights and other office accessories and held a recorder entitled to reimbursement for outlays for necessary janitor service and stamps, stating: 'Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo.'"

In the *Rinehart* case the court also pointed out that in certain counties the Legislature had specifically provided that stenographic services should be furnished a prosecuting attorney, and the court reasoned that provisions for stenographic services to county officials in those counties represented "an approved advance in proper instances for the administration of the laws by county officials and the business affairs of the county and for the general welfare of the public." The court went on to say (153 S. W. (2d) 1. c. 383):

"Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public. * * * "

The Rinehart case is authority, we think, for the conclusion that if a county court determines that stenographic services for a county officer are necessary for the proper conduct of the duties of such officer, such services can be paid for by the county court out of the county revenues, and further that if stenographic services are in fact indispensable to the proper functioning of a county office, and the county court refuses to provide same, and the officer is compelled to provide them himself, then such officer can recover from the county his reasonable and actual expenditures for such services. Whether stenographic services are indispensable to any county officer is a question of fact to be determined in the first instance by the county court, and if that body acts arbitrarily in such determination, then by a court of law in a suit by the officer for recovery of his expenditures for such services.

Your request presents another question, and that is whether a probate judge can appoint the same person as clerk and stenographer and pay such person out of his own money for such services as she renders as clerk, and have her paid out of county funds for such services as she renders as stenographer.

As pointed out above, the probate judge is required to pay his clerk himself. If, by the arrangement suggested in

your request, a probate judge can get his clerk paid out of the county funds, then the arrangement would be illegal because it would result in increasing the compensation of the probate judge. (See Article XIV, Section 8, Constitution of Missouri.)

The Supreme Court, in the Rinehart case, was careful to point out that the allowance to an officer for stenographic services was reimbursement for outlays by the officer for indispensable expenses of his office, and would not, therefore, amount to an increase in the officer's income. If he is reimbursed for necessary outlays, he is merely made whole and his income has not been increased.

From all of the above, we conclude that stenographic services for a probate judge may, under proper circumstances, be legitimate charges against a county, but that the compensation of a probate clerk is not a legitimate charge against the county, but is a charge against the probate judge personally. If one person performs both the service of a probate clerk and a stenographer in the office of the probate court, we see no reason why the respective services could not be paid for by the county and the probate judge proportionately, that is, in amounts for which each is respectively liable. The amount for which the county would be liable will be a question of fact to be determined by the county court. If the officer concludes that the county court has acted arbitrarily in its determination, and that he is obliged to have stenographic services in order to properly carry on his office, and he does in fact provide such services, then he may bring suit against the county to recover for his necessary expenditures in that regard, but the duty would be upon him in such an action to prove that the stenographic services were indispensable to the proper conduct of his office.

We might suggest that the arrangement mentioned in your request may lead to complications and disputes, for the reason that it might be difficult to determine just where the duties of a clerk end and those of a stenographer begin. It must be assumed that the county courts will exercise their good judgment both as to protecting the unnecessary expenditure of public funds and also as to equipping county offices so that they can function in a proper manner. If a county court abuses its discretion in determining the necessity for stenographic services, its actions can be reviewed in a proper proceeding in a court of law.

February 19, 1945

CONCLUSION

It is, therefore, the opinion of this office that (1) stenographic services may be provided by the county court for a probate judge if such county court finds as a fact that such stenographic services are necessary for the proper conduct and administration of the affairs of such office and for the public welfare; (2) that if a county court refuses to provide stenographic services for a probate judge when in fact such services are indispensable to the proper conduct and administration of the affairs of his office, and he provides such services at his own expense, he may recover his actual and reasonable outlay for same, and (3) that a probate judge may appoint the same person as clerk and stenographer in his office, provided the probate judge personally pays such person for services rendered as clerk; the amount of services rendered by such person as stenographer, and whether such services are indispensable to the proper conduct of the office, being questions of fact to be determined in the first instance by the county court, and in case such court acts arbitrarily in such determination, then by a court of law in an action brought by such officer against the county to recover for his outlays for such services.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HHK:HR

OFFICERS: Annual salary of county clerk is based upon
ANNUAL SALARY: term year and not upon calendar year, payable
COUNTY CLERK: in twelve monthly installments.

-FILED

83

February 21, 1945

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. B. E. Ragland,
Chief Clerk

Dear Sir:

Recently you requested an opinion upon the following:

"We request an official opinion on the following subject: A county clerk and his deputies assumed office January 4, 1943. Are they entitled to compensation for the entire month of January 1943, or for only 28 days?"

By virtue of Section 13433, R. S. Mo. 1939, and Laws of 1943, page 874, the respective county clerks and their deputies were in 1943, and are now, compensated by an annual salary paid in monthly installments. The exact language used in these acts is:

"The clerks of the county courts of this state and their deputies and assistants shall receive for their services annually, to be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury, the following sums: * * * * *

County clerks and their deputies are officers (Ward v. Christian County, 111 S. W. (2d) 182, 341 Mo. 1115; State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W.

Feb. 21, 1945

655); and are entitled to the salaries of their respective positions as an incident to their office, and, irrespective of the amount or value of services performed. State ex rel. Nicholai v. Nolte, 180 S. W. (2d) 740; Coleman v. Kansas City, 173 S. W. (2d) 572, 351 Mo. 254. It seems unnecessary to cite authority to sustain the position that an officer is not entitled to the salary of his office until he possesses the title to it.

The crux of the problem herein presented is whether the annual salary of a county clerk and his deputies is based upon a calendar year or a year of twelve consecutive months. If the former, then the first three days of January, 1943, should be deducted from the year's salary; but, if the latter, it would make no difference if such three days were subtracted at the beginning of the term as they would be added at the end of the term, assuming that the clerk and his deputies served the entire period. In other words, if the term "annual salary" refers to a twelve months' period and not a calendar year, such as the year beginning January 1, 1943, and ending December 31, 1943, the clerk and his deputies would be entitled to full year's salaries for the period beginning January 4, 1943, and ending January 3, 1944.

This exact question was ruled by the Supreme Court in the case of State ex rel. Harvey v. Linville, et al., 300 S. W. 1066, 318 Mo. 698. In determining the amount of the annual salary of a superintendent of schools, the following was held, l. c. 1067:

"* * * 'Annual salary,' as used in said section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further that 'annual,' as applied to salaries, means not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the 1st day of April each year."

CONCLUSION

It is, therefore, the opinion of this Department that inasmuch as the annual salary of a county clerk and his depu-

Hon. Forrest Smith

(3)

Feb. 21, 1945

ties is based upon a twelve months' period and not a calendar year, and when such officers assumed office on January 4, 1943, and continued in office until January 3, 1944, they are entitled to their full annual salaries paid in twelve monthly installments.

Respectfully submitted,

VANE C. THURLO
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

VCT:CP

INCOME 1

Construction to be placed on the phrase
"head of a family" as used in Section 11351,
R. S. Mo. 1939.

February 27, 1945

FILED

83

3/1

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. W. H. Holman
Income Tax Supervisor

Dear Sir:

Reference is made to your letter under date of
February 21, 1945, requesting an official opinion of this
office, and reading as follows:

"Section 11351, R. S. Missouri, 1939,
sets forth the exemptions and deductions
for dependents as allowed under the Mis-
souri state income tax law.

"Please advise whether or not in your
opinion an individual can qualify as
'Head of the Family' if unmarried and
having no dependent as defined in this
same section. If an individual can
qualify as 'Head of the Family' without
having a dependent as defined in this
section and is unmarried, please advise
what circumstances would justify the al-
lowance of such claim."

The pertinent parts of Section 11351, R. S. Mo. 1939,
regarding your request, read as follows:

"For the purposes of this tax, there
shall be allowed as an exemption in the
nature of a deduction from the amount of
the net income of each resident individual,

ascertained as provided herein, the sum of \$1,000 plus \$1,000 additional if the person making the return be the head of a family, * * * Provided further, that if the person making the return is the head of a family there shall be an additional exemption of \$200 for each child dependent upon such person, if under eighteen years of age, or if incapable of self-support because mentally or physically defective, * * *."

The Legislature did not define the phrase "head of a family," used in the statute mentioned, nor have we been able to discover any appellate court decisions construing the phrase in connection with this particular statute. In the premises, we are required to construe the words "head of a family" under the general rules of construction applicable to statutory interpretation.

Section 655, R. S. Mo. 1939, reads, in part, as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * *"

Section 11351, R. S. Mo. 1939, first appeared in the original Missouri income tax law of 1917, and, with some changes in the amount of exemptions allowed, remains substantially the same to this date. The phrase "head of a family" was incorporated in the original law and was apparently taken from the laws relating to exemptions from levy of execution.

At the time of the passage of the original Missouri income tax law in 1917, the phrase "head of a family" had acquired a technical meaning, arising from the common law and appellate court decisions. The matter of construction of the words so used fall within the case of *Ex Parte Bethurum*, 66 Mo. 545, from which we quote:

"When words, which have long had a technical meaning, as used in statutes and judicial proceedings, are employed in constitutions and statutes, they are to be understood in their technical sense, unless there be something to show that they were employed in a different sense."

The technical meaning of the phrase "head of a family" had been established by appellate court decisions at the time of the enactment of the state income tax law. Such meaning was defined by the Missouri Supreme Court in the case of *Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 165, reading as follows:

"Long before the adoption of our homestead act this court had defined the words 'head of a family' to be one who controls, supervises and manages the affairs about the house, not necessarily a father or a husband. *State v. Slater*, 22 Mo. 464; *Spengler v. Kaufman*, 46 Mo. App. 644; *Wade v. Jones*, 20 Mo. 75; *State to use v. Kane*, 42 Mo. App. 253.

"'A family is a collective body of persons who live in one house under one head or manager.' *Duncan v. Frank*, 8 Mo. App. 286."

A number of cases decided subsequently to the enactment of the original Missouri income tax law are to the same effect.

Honorable Forrest Smith

-4-

February 27, 1945

CONCLUSION

In the premises, and in the light of the long established and well defined meaning given to the phrase "head of a family" at the time such phrase was incorporated into the Missouri income tax law, we are of the opinion that a single person can attain the status of "head of a family" in the event such person controls, supervises and manages the affairs of a household.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

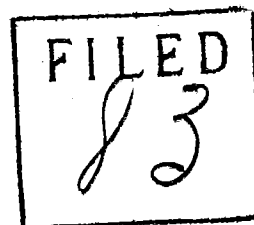
HARRY H. KAY
(Acting) Attorney General

WFB:HR

2/23/45

INCOME TAX: Procedure to be followed by State Auditor in estimating original or additional income tax of members of the armed forces and certain civilians.

February 27, 1945



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. W. H. Holman
Income Tax Supervisor

Dear Sir:

Reference is made to your letter under date of February 22, 1945, requesting the official opinion of this office, and reading as follows:

"This department requests a written opinion regarding the proper method of handling additional assessments and original assessments against members of the armed forces.

* * * * *

"It is therefore desired that you please advise this office how additional assessments and original assessments on 1941 income should be handled. Will such assessments become outlawed if not filed on or before March 15 or will special action be necessary on these cases."

The procedure to be followed by the State Auditor in estimating income taxes or in estimating additional income taxes is governed by Section 11363, R. S. Mo. 1939. The pertinent parts of that section read:

February 27, 1945

"In case any taxpayer shall fail to make return as required by law, the state auditor shall have authority to estimate the amount of such taxpayer's income, from such sources as he may be able to obtain including the business, records and books of any taxpayer, which business, records and books, the auditor is hereby given the right to examine during the usual business hours at any time within three years after the return of such taxpayer is required by law to be filed, and shall certify the amount of income to be used as a basis for the tax to the proper assessor in the county, or the city of St. Louis, in which such taxpayer resides, if an individual, * *. At any time within three years after any return shall have been filed the auditor shall have the right to examine, during the usual business hours, the business, records and books of any individual, corporation, joint stock company, joint stock association or partnership, and to issue a credit slip to any taxpayer, if more tax has been paid than legally due, which credit shall be taken as deduction of the succeeding tax or taxes based on incomes to the extent of such credit, and to certify to the assessor any deficiency determined by the auditor, and not returned by the taxpayer; * * *"

That this section operates as a three-year limitation upon the authority of the State Auditor to make such estimate has been established by State v. Rogers, 172 S. W. (2d) 940.

It is apparent from the plain terms of the statute quoted that a different period of time is allowed the State Auditor to make such estimates, dependent upon whether the taxpayer does not file a return, as distinguished from the situation in which a return is in fact filed. In the first instance, the three-year period commences running from the date the return is required to be filed, whereas if a return is in fact filed, the three-year period commences on the date the return is so filed.

February 27, 1945

The date for the filing of an income tax return and payment of the tax by members of the military or naval forces of the United States and by certain civilians has been fixed by a legislative enactment found in Laws of 1943, at page 1066, at a date later in time than such return or payment of tax would otherwise be due. We are of the opinion that such extension of time granted such members of the military or naval forces of the United States and certain civilians also serves to operate as an extension of the time in which the State Auditor can make estimates of income tax or additional income tax.

CONCLUSION

In the premises, we are of the opinion that in the event any of the persons who are within the purview of the legislative enactment found in Laws of 1943, at page 1066, fails to file an income tax return for any of the years for which such return of income tax and payment of such tax has been deferred by reason of such legislative enactment, that the State Auditor has three years after such return of income tax and payment of tax would be due as determined in accordance with Section 1, Laws of 1943, page 1066, to make an estimate of the taxpayer's income tax. We are further of the opinion that in the event any of the persons who are within the purview of the law referred to does actually file an income tax return at a time prior to that required by such law, the State Auditor must make his estimate of additional tax within three years after such return is actually filed.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

WFB:HR

PROBATE JUDGES: Fees earned prior to November 23, 1943,
belong to the then incumbent of the office
without regard to actual date of collection.

FILED

83

February 27, 1945

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention Mr. B. E. Ragland, Chief Clerk

Dear Sir:

Reference is made to your letter under date of
February 23, 1945, reading as follows:

"We request an opinion on the following
subject: A Probate Judge's annual salary
in a certain county is fixed at \$1200.00,
under the provisions of Laws of 1943, page
869, effective November 22, 1943.

"During the year 1944 said Probate Judge
collected and paid to the county treasurer
\$1157.35; of this amount \$402.75 repre-
sents fees earned prior to November 22,
1943. Is the Probate Judge entitled to
reimbursement of the \$402.75, from the
county?"

The fees mentioned in your letter were earned under
the provisions of Section 13404, R. S. Mo. 1939. As was
said by the Supreme Court in the case of Smith v. Pettis
County, 136 S. W. (2d) 282, "It is necessary to bear in
mind that such 'fees' although an emolument of the office
are allowed to and become the property of the judge him-
self. While the office invests the officer with title to
the fees they do not belong to the office but to the of-
ficer. See Mayfield v. Moore, 53 Ill. 428."

February 27, 1945

This rule follows the decision in the case of *Givens v. Daviess County*, 107 Mo. 603, 1. o. 610, from which we quote:

"Every day he held the office the law vested in him a right to a due proportion of the salary, as at that time fixed, and, consequently, an order changing the compensation could not have a retrospective operation and divest from him what was his already. Hence, when the order of December 6 was made, plaintiff had the undoubted right to demand and collect, as salary, at the rate of \$1,500 per year from the commencement of his term, January 24, 1885, to that date."

We, therefore, conclude that although the compensation of an officer may be reduced during his term, yet such reduction cannot affect salary or fees earned prior to such time, as to give that effect to the law reducing the compensation would be to construe the law as retrospective, and consequently in violation of Article II, Section 15, of the Constitution of Missouri, reading, in part, as follows:

"That no * * * law * * * retrospective in its operation, * * * can be passed by the General Assembly."

Further, a statute must be held to operate prospectively only unless the intent is clearly expressed that it shall act retrospectively, or the language of the statute admits of no other construction. *Lucas v. Murphy*, 152 S. W. (2d) 686. No such intent appears in the amendment to Section 13404, R. S. Mo. 1939, appearing in Laws of 1943, at page 868, nor is the language contained therein incapable of being otherwise construed.

CONCLUSION

In the premises, we are of the opinion that Section 13404A, Laws of 1943, page 868, is prospective in its nature;

Honorable Forrest Smith

-3-

February 27, 1945

that such statute did not affect the title of the then incumbent of the office of probate judge to fees earned prior to November 23, 1943; and that such probate judge is entitled to such fees so earned whenever collected, subject to the limitations as to amount found in Section 13404 of Article II, Chapter 99, Revised Statutes of Missouri, 1939.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

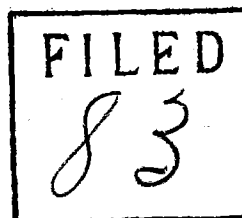
APPROVED:

HARRY H. KAY
(Acting) Attorney General

WFB:HR

STATE BARBER BOARD: -Not authorized to examine applicant unless applicant has had training under licensed instructor.

March 21, 1945



3/23

Honorable Harry G. Sloan, President
State Board of Barber Examiners
4617 Troost Avenue
Kansas City, Missouri

Dear Mr. Sloan:

Under date of March 9, 1945, you wrote this office requesting an opinion as follows:

"The State Board of Barber Examiners desires an opinion from your office upon a question involving the interpretation of Sections 10133 and 10134, R. S. Mo. 1939.

"The question is whether or not, under the provisions of the above mentioned sections, a person desiring to secure a license to practice the trade of barbering is authorized to take an examination under the State Board by serving an apprenticeship under a licensed barber who has not been licensed as an instructor in barbering by the State Board of Barber Examiners."

Your request calls for our interpretation and construction of the two statutes mentioned, Sections 10133 and 10134, and in connection with our reply we quote a few of the fundamental rules of statutory construction. These rules are taken from the cases of Artophone Corporation v. Coale, 345 Mo. 344, 1. c. 353:

"* * * Of course 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words of the statute if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and "the manifest purpose of the statute, considered historically," is properly given consideration.'"

And Cummins v. Kansas City Public Service Company, 334 Mo. 672, 1. c. 701:

"In arriving at the meaning of a statute, the language thereof is to receive a common-sense construction, words being taken in their usual and ordinary sense. If the import of the act, so read, is not clear certain extrinsic aids to construction may be resorted to, such as a consideration of the prior state of the law and the legislative policy evidenced by related statutes. * * *"

For a better understanding of the problem it is deemed advisable to give a brief history of the legislation relating to practicing the trade of barbering. The first act was passed in 1899, Senate Bill 59, Laws of 1899, page 44. This law has been amended from time to time, the dates of all of the amendments are omitted because they are not pertinent to your inquiry. However, the last amendment in 1939 does contain a clause which is vital to the solution of your question. It is found in the amendment of 1939, House Bill 189, Laws of 1939, page 249, and relates to the licensing of persons who teach barbering, and is here quoted from Section 10133:

"* * Any person desiring to teach barbering in this state in a barber school, college or barber shop must first make application to appear before said board for an examination as a teacher or instructor in said occupation and shall pay to the treasurer of said board an examination fee of \$25.00, whereupon said board shall

proceed to examine such applicant and after finding that he is duly qualified to teach said occupation, said board shall issue to him a certificate of registration entitling him to teach barbering in this state, subject to all the provisions of this chapter."

Interpretation and construction of this statute with the first clause of Section 10134 has given rise to your question. The first clause of Section 10134 is as follows:

"Nothing in this chapter shall prohibit any person from serving as an apprentice in said trade under license issued by the board under a barber authorized to practice in the same, under this chapter, nor from serving as a student in any school or college for teaching said trade under the instruction of a qualified barber; * * *"

This clause was in the first law enacted in 1899 and has remained the same ever since.

Section 10133 prescribes the qualifications for persons desiring to take an examination for the purpose of procuring a barber's license. The qualifications required by the original act of 1899 and carried down to 1939 are as follows:

"Any person not following the occupation of barbering at the time this chapter goes into operation, desiring to obtain a qualified certificate of said occupation in this state, shall make application to said board therefor and shall pay to the treasurer of said board an examination fee of ten dollars, and shall present himself at the next regular meeting of the board, for examination of applicants, whereupon said board shall proceed to examine such person, and, being satisfied that he is above the age of nineteen years, of good moral character, free from contagious or infectious diseases, has either

studied the trade for two years as a registered apprentice, under a qualified and practicing barber, or studied the trade for at least 1000 hours over a period of not less than six months in a properly appointed and conducted barber school under the direct supervision of an instructor, who is licensed as such by the State Barber Board of Missouri; and an additional eighteen months as a registered apprentice under a qualified and practicing barber, or practiced the trade in another state for at least two years and is possessed of requisite skill in said trade to properly perform all the duties thereof, including his ability in the preparation of the tools, shaving, hair-cutting and all the duties and services incident thereto, and is possessed of sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of said trade, shall enter his name in the register hereinafter provided for, and shall issue to him a certificate of registration, authorizing him to practice said trade in this state: * * *

From the enactment of the first law regulating the practice of the trade of barbering, until 1939, there was no attempt made to license persons teaching the trade other than that they were required to be licensed barbers as shown by the above quoted portion of Section 10133. Under this situation the law did not attempt to prohibit any person from studying to become a barber either as an apprentice or as a student in a school or college. It merely prohibited persons from taking an examination and procuring a license until they had acquired the qualifications required for a person desiring to be examined. For example, the license could not be granted until the person had attained the age of eighteen, but a person seventeen years of age might become trained as an apprentice or a student.

It is apparent that the first clause of what is now Section 10134 was not intended to make an exception to the provision of Section 10133 setting up the qualifications required for procuring a license to practice the trade.

March 21, 1945

By the terms of the 1939 amendment heretofore referred to, persons who teach or instruct are required to procure a license before engaging in the instruction of persons who desire to qualify. Hence, under the law as it exists at the present time, the qualifications required of an applicant for a license as a barber have been increased so that the applicant must have had the required instruction, either as an apprentice or as a student in a school or college, from some person who is licensed as a barber and further licensed as an instructor.

Conclusion

Therefore, the conclusion is reached that, under the law as it exists today, the State Board of Barber Examiners is not authorized to examine an applicant for a license unless said applicant has had the required instruction, either as an apprentice or student, from a person licensed as an instructor.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WOJ:EG

DELINQUENT TAX LAND SALES:

Purchase price paid at invalid sale
may be refunded to purchaser.

July 30, 1945

FILED

83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This will acknowledge the letter of Honorable Carl L. Dickson, County Clerk of Vernon County, Missouri, dated July 14, 1945, in which he advised that he had previously requested from you a ruling on the matter involved, and that he had been directed by you to this Department for reply. The letter states:

"Recently we wrote the State Auditor and asked the following question and he suggested it be referred to you.

"Mr. L. J. Sechler of Stanley, Kansas purchased eighty acres of land in Vernon County at the November tax sale. Mr. Sechler has now been advised by an attorney that under the Missouri laws, that he being a resident of Kansas could not be a bidder at a tax sale without first appointing a resident of Missouri as his agent. Sechler has now appeared before the county court asking for a refund of his money he had paid at the tax sale.

"Is he entitled to a refund as he has returned the tax sale certificates to Mr. Geo. Lyons the county treasurer. And if so, how would we show the property on the tax books in order to be sold again this November?"

July 30, 1945

"On the Treasurer's annual settlement this was shown as charged off to tax sale and therefore is no longer on the delinquent tax book. Would this be charged back as an added assessment for these five years? The purchase price was \$165.00, which was a surplus of \$122.45. The total tax, penalty and interest cost was \$42.56.

"We would appreciate hearing from you as to the proper procedure to take in this matter."

There are a number of sections in our delinquent and back tax sales statutes that must be read and considered together in answering your inquiry.

Section 11127, R.S. Mo. 1939, provides for the date of sale of lands for delinquent taxes, and the manner of making bids, and in that particular need not be quoted here for the purposes of this opinion. The first proviso, however, of said Section 11127, has much to do with the questions here being considered, and reads in part, as follows:

"* * * Provided, no bid shall be received from any person not a resident of the State of Missouri, until such person shall file with said collector an agreement in writing consenting to the jurisdiction of the circuit court of the county in which such sale shall be made, and also filing with such collector an appointment of some citizen of said county as agent of said purchaser, and consenting that service of process on such agent shall give such court jurisdiction to try and determine any suit growing out of or connected with such sale for taxes. * * * "

Section 11129, provides for the re-offering of delinquent lands for sale, and reads as follows:

July 30, 1945

"If at the first offering of sale of any tract of land or lot under the provisions of this law no person shall bid therefor a sum equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact in his record of sale and the county collector shall note a recital thereof in his record containing the list of delinquent lands and lots, and said tracts of land or lots shall be again offered for sale, at the next sale of delinquent lands and lots as in this law provided, if such lands or lots be at such time delinquent. If at the second offering for sale no person shall bid therefor a sum equal to the then delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact upon his record of the sale, and the county collector shall enter a recital of such fact in his record book containing the list of delinquent lands and lots."

Section 11155 provides for the refunding of purchase money to any person who was the intended purchaser at an invalid sale, and among other things, provides that the Statute of Limitations should not run against the collection of delinquent taxes during the period of the invalid sale and the discovery of its invalidity. Said Section 11155 reads as follows:

"Whenever the county collector shall discover, prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever, invalid, he shall not convey such lands; but the purchase money and the interest thereon shall be refunded out of the county treasury to the purchaser, his representatives or assigns, on the order of the county court. Such invalid sale shall suspend for the period intervening between the date of the sale and the discovery of its invalidity the running of the statute

July 30, 1945

of limitations. In such cases the county collector shall make an entry opposite to such tracts or lots in the record of certificates of purchase issued or redemption record that the same was erroneously sold, and the cause of invalidity, and such entry shall be prima facie evidence of fact therein stated. He shall notify the county clerk of such action whose duty it shall be to make a like entry upon his sale record."

These sections mentioned and quoted, each in some measure, and all when taken together, provide, we think, the plan for the solution of this question.

The first proviso of Section 11127, supra, prohibits any bid from being received for lands sold for delinquent taxes on the date of sale fixed by law, from any person not a resident of the State of Missouri, until he files with the collector, the written instrument said proviso requires. The facts in this case indicate that the bidder was a non-resident of this State, and had not filed the document required by law with the collector previous to making his bid. This, we think, would amount to no bid at all.

Section 11129, supra, states that if at the first offering of sale no person shall bid therefor a sum equal to the delinquent taxes, the clerk shall then make a note of such fact in his record of sale, and the collector shall note a recital thereof in his record, and such lands shall again be offered for sale at the next sale of delinquent lands.

This attempted sale, it is said, took place at the November sale, 1944, of lands for delinquent taxes in Vernon County, Missouri. It is evident that the discovery of the invalidity of the sale, because of the non-compliance with the terms of the proviso of said Section 11127, was made long before the collector would have the right under the terms of Section 11149 to convey by deed the lands sold to the purchaser which gives the former owner two years to redeem such property. Therefore, the invalidity of the sale in question, being discovered prior to the conveyance of such lands, comes strictly within the terms of Section 11155, supra. Said Section 11155 provides that the purchase money paid upon an invalid sale shall be refunded to the purchaser, his representatives or assigns, out of the county treasury. Such provisions for refunding the purchase money to the in-

July 30, 1945

tended purchaser are so plain and forthright that there is no ground or necessity for rules of statutory construction to be applied thereto. The intended purchaser has the right to his money, and the statute says it shall be paid to him.

Said Section 11155 also provides that during the period between the date of the invalid sale and its discovery, the Statute of Limitations shall not run in favor of the delinquent taxpayer. That is not the exact words of the statute, but that is its meaning. So the delinquent taxpayer would be back right where he was on the date of the invalid sale with respect to the Statute of Limitations.

Said Section 11155 further provides that in such cases the County Collector shall make an entry opposite to the description of such tracts or lots in the record of certificates of purchase issued or redemption record, and record that the same was erroneously sold, and the cause of the invalidity. The statute says he shall then notify the County Clerk of such action whose duty it shall be to make a like entry on his sale record. This, we think, points out that upon the discovery of the invalidity of a sale, the statute intends that the Collector shall so make his record, notify the County Clerk thereof, and the County Clerk shall make his record for the purpose of placing, and that there shall be placed back on the delinquent list the lands sold at the invalid sale, for the next sale of delinquent lands in the county. This view, we believe, is in harmony with the provisions of Section 11129, supra, which provides if there is no bid, and surely it must be said under the circumstances of this case that there was no bid, because the Collector was prohibited from receiving a bid, under such circumstances, the Collector shall note a recital thereof in his record containing a list of delinquent lands, and said lands shall be again offered for sale at the next sale of delinquent lands. We believe the Collector and the County Clerk have continuing duties in this regard, and are empowered to perform them, with respect to reassigning such lands for the next sale, upon the discovery of an invalid sale, the same as they would under the terms of Section 11129, supra.

By harmonizing these several statutes and their provisions, we think the answer to the question you present is found.

CONCLUSION.

It is, therefore, the opinion of this Department

July 30, 1945

that a non-resident of the State of Missouri, who has bid on the offer of sale for taxes of land in Missouri, without having filed the instrument required by Section 11127, R.S. Mo. 1939, but having paid the amount of his bid to the County Collector as and for the purchase price of said land is, under the terms of Section 11155, R.S. Mo. 1939, entitled to have the money refunded to him out of the county treasury.

That said land should be again listed, under the terms of the statutes above set forth, for sale at the next sale of delinquent land.

That under the terms of Section 11155, supra, the Statute of Limitations would be suspended, and the tax due on this land would be charged back as it originally was for the five years previous to the date of the attempted sale.

That said land may then lawfully be offered at the next November sale for delinquent lands in Missouri.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

CONSTITUTIONAL LAW: Secs. 29 and 52, Art. III, Constitution of 1945, must be read together in determining effective date of bills.

LEGISLATION: Emergency clauses in H.B.s 244, 255, 264, 63rd General Assembly invalid. H. B. 244 will not increase salary of clerk of Supreme Court during the term in which it becomes effective, but can increase salary of deputy clerks. H.B.s 255 and 264 operative as soon as effective.

August 13, 1945



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

We have your letter of recent date, which reads as follows:

"House Bill No. 264, passed by the General Assembly and signed by the Governor, provides for increasing the salary of the chief clerk and certain other employees of the State Department of Education.

"House Bill No. 255, passed by the General Assembly and signed by the Governor, provides for increased salary of the Marshal of the Supreme Court.

"House Bill No. 244, passed by the General Assembly and signed by the Governor, provides for increasing the salary of the Clerk of the Supreme Court and other clerks of the Supreme Court.

"Each of these three bills carry a purported emergency clause. Will you please give me an opinion as to when the increase in the salaries of House Bill No. 264, House Bill No. 255, and House Bill No. 244, will become effective?"

As stated in your letter, each of the three bills inquired about contains a purported emergency clause. Two sections of the constitution must be considered in determining the validity of such emergency clauses. Said sections are Nos. 29 and 52 of Article III, and they read as follows:

August 13, 1945

"Section 29. No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that the laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

"Section 52. A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five per cent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded.*****Any measure referred to the people shall take effect when approved by a majority of the votes cast thereon, and not otherwise."

While Section 29, supra, provides that an act may go into effect sooner than ninety days after the adjournment of the legislature "in case of an emergency," yet Section 52 provides that all laws except those "necessary for the immediate preservation of the public

peace, health or safety" (and some others not material to our discussion here) shall be subject to referendum at any time within ninety days after the adjournment of the legislature. As we shall hereinafter point out, the courts have always construed these two constitutional provisions together and have held that the emergency referred to in Section 29 must be such as makes it "necessary for the immediate preservation of the public peace, health or safety" that a statute go into effect sooner than ninety days after the adjournment of the legislature.

The Supreme Court of this state some 25 years ago had occasion to consider two almost identical provisions of the constitution of Missouri in the case of *State ex rel v. Sullivan*, 283 Missouri 546, 224 S.W. 327. In that case the court said (224 S. W. 1. c. 337):

"The next contention is that although we may rule that the usual emergency clause of a measure may not prevent its reference, as we have ruled above, yet it is contended that the expressions in section 81 of the measure before us are such as to amount to a legislative declaration that the measure is one 'necessary for the immediate preservation of the public peace, health, or safety,' and that the courts cannot go back of such legislative declaration.

"In the first place the language in said section 81 of the act of 1919 (Laws of 1919, p. 484) is not such a legislative declaration, and with this the matter might end. In a valuable note in 36 Cyc. p. 1194, it is well said:

"Under a constitutional provision for the submission of acts to the people before their taking effect, 'except as to laws necessary for the immediate preservation of the public peace, health or safety,' a clause intended to put them in effect before the time prescribed by the general

law must not only declare an emergency, but must also set forth such an emergency as described in the above-quoted provision of the Constitution.'

"This emergency clause touches neither side nor bottom, when measured by this rule. But both sides urge and discuss the larger question, as to whether or not such legislative declaration would foreclose the matter in the courts. Upon this question the courts are divided, and in our judgment, some have been lead into error by reason of court rulings upon mere emergency declarations. Before the days of initiations and referendums all the state constitutions contained sections similar to our section 36 of article 4 of the Missouri Constitution. The courts were liberal in construing the emergency provision of such sections. They largely ruled that when the lawmaking body said that an emergency existed the matter was foreclosed. It was simply a matter of the time at which the law became effective, and had no real substance. And since the referendum provisions of state constitutions some courts, viewing the 'peace and safety' clause of these constitutional provisions in the light of mere emergency clauses of a law, have ruled that, if the lawmaking body declared that the measure was for the 'immediate preservation of the peace, health or safety,' such legislative declaration was binding upon the courts and a finality. To the rule in this line of cases we do not agree. The very substance of a constitutional right could be taken from the people by an overanxious and hostile legislative body. The right here involved is not only constitutional, but one of vital importance and of large proportions. If the courts cannot view the whole measure, and from it determine whether or no the lawmakers overstepped the constitutional

restrictions in denying the referendum of the measure by their ukase on the subject of 'immediate preservation of peace, health or safety' then the constitutional referendums become a farce. It becomes a legislative referendum, rather than a constitutional referendum, because by a mere false declaration as to 'the peace, health or safety' every measure could be precluded from the constitutional referendum."

Later in the foregoing opinion, the court said:

"The reason of the thing lies with this rule. By the referendum provision of our Constitution, as we have construed it, supra, no measure subject to the referendum can be withdrawn therefrom by a mere emergency clause. Nor should the people be denied their constitutional right of referendum by a mere declaration of 'immediate preservation of the peace, health or safety' unless such declaration is borne out by the face of the measure itself. The courts have the right to measure the law by the yardstick of the Constitution, and determine whether or not the lawmakers breached the Constitution in making the declaration."

After discussing cases from other states on the same question, the court further said in the Sullivan case (224 S. W. 1. c. 339):

"So that in the case at bar, had the lawmakers in section 81 of the measure actually declared such measure to be necessary for the 'immediate preservation of the peace, health or safety,' we would hold such section void upon a comparison of the measure as a whole with the constitutional provisions of section 57 of article 4 of the Constitution. The words 'necessary for the immediate preservation,' as found in our Constitution, must be given effect, and are of vital importance in measuring the legislative act by the

Constitution. Many acts may be necessary to public peace, health, and safety, yet not be 'necessary for the immediate preservation of the public health, peace or safety.'"

The above case has been consistently followed by the Supreme Court of Missouri. In the later case of State ex rel v. Becker, 289 Mo. 660, 233 S. W. 641, the decision in the Sullivan case was attacked for several reasons, but the Court expressly approved the holding of the Sullivan case on the question of the validity of an emergency clause in a legislative act and of the power of the Court to question such validity. The principal opinion in the Becker case said:

"There is but a single legal proposition presented by this record to this court for determination, and that is, Has the Legislature of the state the constitutional authority under section 57, art. 4, of the Constitution, to enact a law, and debar the power of the courts of the state from passing upon the question as to whether or not the law is subject to referendum by adding thereto the words, 'This enactment is hereby declared necessary for the immediate preservation of the public peace, health, and safety, within the meaning of section 57, of article 4 of the Constitution of Missouri'? * * * * *

This question has been most elaborately and ably discussed by counsel for the respective parties, and all the authorities bearing upon the question from the various states of the Union have been cited; and, after a thorough consideration of the same, I am fully satisfied that the law of the case was, and is, fully and correctly declared by Judge Graves in the case of State ex rel v. Sullivan, 224 S. W. 327, where the same legal proposition was presented to this court for determination that is here presented by this case. I fully concurred in the views as there expressed by Judge Graves, and adopt them as my views of the law of this case."

The Sullivan case was also cited with approval on the same question in *State ex rel v. Maitland*, 296 Mo. 338, 246 S. W. 267, and *Fahey v. Hackmann*, 291 Mo. 351, 237 S. W. 752. Also in the case of *State ex rel v. Linville*, 318 Mo. 698, 300 S. W. 1066, 1068, the Court said:

"It was held in the case of *State v. Sullivan*, 283 Mo. 546, 224 S. W. 327, that these two sections of the Constitution must be construed together; that a declaration in a bill that it was an emergency measure within the meaning of the Constitution, did not make it so; that the emergency must appear in fact upon the face of the bill to be within the terms of the Constitution, authorizing an emergency clause which would put the act into immediate effect."

From the above we think it is clear that even though a legislative act declares that an emergency exists and that the act is "necessary for the immediate preservation of the public peace, health or safety," the Courts are not bound by such declaration, but may and should look at the whole act to determine whether in fact such an emergency is set forth in the act as will authorize the legislature to cause the act to become effective sooner than ninety days after the adjournment of the legislature. With this principle in mind, we turn to the various acts under consideration to see if they are such as justify emergency clauses, putting them into effect immediately upon passage and approval.

H. B. 244 is an act to repeal Section 13273, L. 1943, p. 402, relating to the clerk of the Supreme Court and deputies, their salaries and appointment, and enacting in lieu thereof a new section relating to the same subject matter. A comparison of said bill with Section 13273, *supra*, will show that all that is accomplished by the act is an increase in the salary of the clerk and his deputies. As pointed out above, if an emergency exists, it must be set forth in the face of the act. The Supreme Court has expressly held that

an act which merely increases salaries of officials is not one for which an emergency clause can be made effective. In the case of State ex rel v. Linville, supra, a statute had been passed increasing the salary of a County Superintendent of Schools and the act contained an emergency clause. If the emergency clause was valid and effective, the act would have gone into effect three days before the election of the County Superintendent, and hence would have entitled him to the increased salary. The emergency clause in that case read as follows:

"Sec. 4. Emergency Clause. The fact that the annual school election will be held on the first Tuesday in April, 1919, at which time county superintendents of public schools for the several counties in this state will be elected, creates an emergency within the meaning of the Constitution; therefore, this act shall take effect and be in force from and after its passage."

After discussing the law on emergency clauses in that case, the Court said (300 S. W. 1.c. 1068):

"Plainly the emergency clause in the act does not state a condition to which the emergency provision of the Constitution could apply."

The Linville case was followed in the case of Hollowell v. Schuyler County, 322 Mo. 1230, 18 S. W. 2nd 498.

It would seem, therefore, that inadequacy of salaries of public officials does not constitute such an emergency as would make it "necessary for the immediate preservation of the public peace, health or safety" that an act increasing them should go into effect earlier than the ordinary time provided by the Constitution. In fact, H. B. 244 does not declare that the act is "necessary for the immediate preservation of the public peace, health or safety." It reads as follows:

"Section 3. This act relates to the compensation of the Clerk of the Supreme Court and his deputies, changing the manner of payment of the salaries of certain deputies to conform with the new Constitution of Missouri, and provides for expediting the work of the office. An emergency is, therefore, declared to exist within the meaning of the Constitution, and this act shall be in full force and effect upon its passage and approval by the Governor."

In the Sullivan case, supra, the Court inferentially, at least, held that an emergency clause to be valid would have to contain such a declaration. (See first quotation from said case above.) Also in the case of Fahey v. Hackmann, supra, the Court in discussing an emergency clause said:

"This act of November 11, 1921, does not have what is called a 'peace, health or safety' clause, and it would be ineffective if it did. State ex rel v. Becker 233 S.W. 641. It only has the emergency clause set out above."

The emergency clause in that case read as follows(237 S. W. 1.c.761):

"Sec. 26. The fact that many of the beneficiaries of this act are not employed and in dire need of the partial compensation sought to be provided for them in this act creates an emergency within the meaning of section 36 of article 4 of the Constitution of the state of Missouri, and this act shall be in full force and effect immediately upon being approved and signed by the Governor."

Therefore, the subject matter of H. B. 244 is not only insufficient to justify an emergency clause, but the emergency clause itself is not in the proper form required by the Constitution.

August 13, 1945

H. B. 255 is an act to repeal Section 2050 R. S. Mo. 1939, relating to the compensation of the marshal of the Supreme Court and enacting in lieu thereof a new Section No. 2050, relating to the compensation and expenses of said marshal, and the expenses of transporting prisoners, employment of a guard and disposition of fees received by the marshal. Under Section 2050 R. S. Mo. 1939, the marshal is paid compensation at the rate of \$2500 per annum, in monthly installments, plus fees of not to exceed \$500 per year. Other sections of the statutes entitle the marshal to mileage and other expenses. (Sections 13414, 13416, 9004).

Under H. B. 255, the marshal is to be paid compensation for his services at the rate of \$4500 per annum, in monthly installments, and is to be reimbursed for his actual expenses of travel and subsistence while traveling. Said H. B. 255 also provides for the compensation and expenses of a guard and of prisoners in certain cases. The ultimate effect of the new act is to change the amount of the marshal's compensation and the method of reimbursing him for expenses, with additional provisions as to the transportation of prisoners. We do not see how the subject matter of this bill could be any more of an emergency than an increase in the salary of an officer, which was discussed above. The last clause of H. B. 255 reads as follows:

"Section 2. This act relates to the compensation of the marshal of the Supreme Court and the transportation of prisoners by him, changing the method of compensation to conform to the new Constitution of Missouri, and it being necessary for the immediate preservation of the public peace, health and safety, an emergency is therefore declared to exist within the meaning of the Constitution and this act shall be in full force and effect upon its passage and approval by the Governor."

It may be the legislature, in referring to "changing the method of compensation to conform to the new Constitution of Missouri" had in mind Section 13 of

of article 6 of the Constitution which reads as follows:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

Even if said section applies to the marshal of the Supreme Court, it will not be effective until July 1, 1946, because statutes covering such matters as therein referred to will continue until that date, (Section 2, Schedule to Constitution) so that there is no "immediate" necessity for a change in Section 2050 of the statutes.

To create an emergency there must be a situation calling for the "immediate preservation of the public peace, health or safety." In 59 C.J. 692, it is said:

"'Immediate' refers to laws that should take effect in order to preserve the public peace, health, or safety before the time when the people under the provisions of the referendum would have an opportunity to vote on them. 'Immediate' qualifies the words 'public peace, health and safety.'"

Likewise, in *State ex rel v. Sullivan*, supra, 224 S.W. 1.c. 339, the Court said:

"The words 'necessary for the immediate preservation,' as found in our Constitution, must be given effect, and are of vital importance in measuring the legislative act by the Constitution. Many acts may be necessary to public peace, health and safety, yet not be 'necessary for the

immediate preservation of the public peace, health, or safety."

It must be assumed that the legislature will see to it that H. B. 255 is made effective before Section 13 of Article 6 of the Constitution goes into effect July 1, 1946. At any rate, that is a future problem and is not one for immediate consideration.

In view of all of the above, we do not believe that H. B. 255 sets forth an emergency within the meaning of the Constitution.

H. B. 264 is an act to repeal Section 10600 R. S. Mo. 1939, relating to the employment of a chief clerk in the office of the State Superintendent of Schools and to enact in lieu thereof a new act, relating to the appointment, duties and salaries of employees of the State Department of Education.

Said Section 10600 R. S. Mo. 1939 reads as follows:

"The state superintendent shall be entitled to employ a chief clerk, who shall sustain the same relations to the state superintendent as are sustained by the chief clerks of other state officers. The chief clerk shall perform such clerical and other work as may be directed by the state superintendent, and shall hold his office at the pleasure of the state superintendent."

It will be noticed by the foregoing section that the State Superintendent is only authorized to employ a chief clerk. By Section 10604 of the statutes he is authorized to employ a negro inspector of negro schools. By Section 10536 he is authorized to employ certain vocational education employees, and by Section 10557 he is authorized to employ an inspector of teacher-training. We find no other statutes expressly authorizing the State Superintendent to employ other persons to assist him in carrying out the duties of his office. It is a well known fact that the State Superintendents have always had a large staff of employees.

It is very evident that the State Superintendent could not run his office efficiently and perform the many duties enjoined upon him by law without a large staff of employees. Education is one of the main activities of the state and a reading of the statutes will show that the State Superintendent has multiple duties to perform. It might be suggested that since the State Superintendent is charged by law with the performance of so many important duties and has only express authority to employ a very few people, an emergency exists and that the general assembly was trying to meet that emergency by enacting H. B. 264, giving to the State Superintendent specific authority to employ sufficient help to perform the duties of his office and by inserting an emergency clause in said act. In other words, it might be suggested that since one of the most important state departments is without authority to employ sufficient help to carry on its functions an emergency within the meaning of the Constitution exists. Let us examine such suggestion.

In the first place, as was pointed out in the first part of this opinion the Constitution requires that an act must declare or set forth the emergency with which it purports to deal. Merely declaring that an emergency exists does not make it so. H. B. 264 does not state what emergency exists except to say "it is necessary that this act be in effect at the earliest possible time, in order that the State Department of Education may properly carry out its duties as prescribed by law." Why the State Department of Education cannot properly carry out its duties in the absence of such act is not set forth.

In the second place, the mere fact that there are no statutes expressly authorizing the State Superintendent to employ clerks, stenographers, supervisors and others does not necessarily mean that he does not have such authority. It is well established that where express authority is given a public officer to do certain things that authority carries with it implied authority to do everything necessary to make the express authority efficacious. In *State ex rel v. Wymore*, 345 Mo. 169, 132 S. W. 2nd 979, 987, the Court said:

"The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers, as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.' Throop's Public Officers, Sec. 542, p. 515.

"Necessary implications and intendments from the language employed in a statute may be resorted to to ascertain the legislative intent where the statute is not explicit, but they can never be permitted to contradict the expressed intent of the statute or to defeat its purpose. That which is implied in a statute is as much a part of it as that which is expressed. A statutory grant of a power or right carries with it, by implication, everything necessary to carry out the power or right and make it effectual and complete, but powers specifically conferred cannot be extended by implication.' 59 C.J. Sec. 575, pp. 972, 973; *Hudgins v. Mooresville Consol. School Dist.*, 312 Mo. 1, 278 S. W. 769; *State ex rel. Wehl v. Speer*, 264 Mo. 46, 223 S.W. 655; *In re Sanford*, 236 Mo. 665, 139 S. W. 376."

Also in *State ex rel v. Hackmann*, 276 Mo. 110, 207 S. W. 64, 65, the Court said:

"But it is also well-settled, if not fundamental, law that, whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual is conferred by implication."

In the case of *State ex rel v. Thompson*, 316 Mo. 272, 269 S. W. 338, the Court was considering the

authority of the Board of Permanent Seat of Government to appoint an assistant commissioner of the Permanent Seat of Government. The statutes only expressly authorized the appointment of a commissioner of the Permanent Seat of Government and as many watchmen as the Board might deem necessary for the proper protection of the state's property. The Board had, however, appointed an assistant commissioner of the Permanent Seat of Government and the authority of the Board so to do was attacked in this suit. In discussing the case the Court said (289 S.W. 1.c. 340):

"While the foregoing covers the authority which has been specifically granted to the board as to the employment of assistants in the work of carrying out the duties and functions of the board of the permanent seat of government, there is no inhibition against the appointment or employment of such others as may be necessary to carry out its purposes, and, since said board is charged with a duty and responsibility of looking after and protecting such public property of great value, it was doubtless the intent of the Legislature to leave such appointees and employees and the amount of their compensation to the discretion of the board. This is manifested by the provisions of section 83 of Appropriation Act of 1925, found at page 33 of the 1925 Session Laws, which appropriates \$185,930 in a lump sum to meet the contingent expenses of the board, including the salaries of 'engineers, firemen, assistant commissioner, watchmen, janitors, matrons, helpers and assistants as may be deemed necessary by the board.'"

The Court in that case recognized the implied authority of the Board of Permanent Seat of Government to employ such help as was necessary to properly carry out the duties of the Board, and the legislature had recognized that implied authority by appropriating money for the pay of various employees not expressly provided

for by statute. The same situation prevails with respect to the State Superintendent of Schools. The legislature certainly would not enjoin multiple duties upon that officer and expect him to do all those duties himself or with a small number of assistants expressly provided for by statute. The legislature has likewise recognized the implied authority of the State Superintendent to employ additional help not specifically provided for by statute by appropriating money for the pay of such employees. Reference to the appropriation act found at page 149, L. 1943 will show that item of \$156,000 is appropriated to pay "salaries of chief clerk, statisticians, high school inspectors, rural school inspectors, negro school inspectors, clerks, stenographers, janitors and extra help."

It cannot be contended, therefore, that the State Superintendent of Schools was without authority to appoint sufficient help to run his department prior to the passage of H. B. 264. In this respect, the State Superintendent stood in no different situation than other departments which had express authority to employ clerks and other assistants. He was limited in what he could pay them (except in the cases of the chief clerk, negro inspector and inspector of teacher-training, whose salaries were set by law), by the appropriation of the legislature for those purposes. The ultimate effect of H. B. 264 is to increase the salaries of the chief clerk and to set a ceiling upon the salaries of other employees of the department. As pointed out above in this opinion, inadequacy of compensation of public officers and employees does not constitute an emergency within the meaning of the Constitution.

Conditions much more threatening to the public peace, health or safety than those dealt with in the three bills under discussion here were held not to constitute an emergency within the meaning of the Constitution in the case of *State ex rel v. Thompson*, 19 S. W. 2nd, 642. In that case the Court said (l.c. 647):

"The act, whether considered as a whole or with reference to a single one of its provisions, cannot be regarded as an emergent police measure. The early

completion of the state highway system, the reimbursement of counties for money expended on the state highway system, the relief from congestion of traffic in areas adjacent to St. Louis and Kansas City, and a beginning of supplementary state highways in counties, are all desirable, and when accomplished will no doubt greatly contribute to the public welfare, and indirectly promote the public peace, health, and safety. But it cannot be affirmed that any of these things are necessary for the immediate preservation of the public peace, health, or safety."

So far as the emergency clauses are concerned, therefore, the three bills under discussion will go into effect ninety days after the adjournment of the present session of the 63rd General Assembly unless the General Assembly recesses for thirty days or longer and provides by joint resolution that said bills shall take effect ninety days from the beginning of such recess, in accordance with Section 29 of article 3 of the Constitution, supra. However, in order to answer your question, the real object of which is to determine when you shall commence issuing warrants in accordance with said three acts, it is necessary that we direct attention to another provision of the constitution. Section 13 of article 7 reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

It is held that a provision like the above applies only to officers having a fixed term. In 46 C.J. 1023, it is said:

"A constitutional prohibition against changing the compensation of an officer during his term applies only to officers having a fixed and definite term."

Also in the case of State ex rel v. Farmer 271 Mo. 306, 196 S.W. 1106, 1109, we find the following:

"The constitutional provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a term by statute only, and in no wise refers to the individual who may incidentally happen to be the incumbent for more than one term."

Also in the case of State ex rel v. Johnson, 123 Mo. 43, it was held that a city officer appointed by the council and subject to removal by it at pleasure is not an officer within the meaning of the Constitution prohibiting the increase of the salary of an officer during his term.

The appointment of the clerk of the Supreme Court is provided for by Section 13270 R. S. Mo. 1939, which reads as follows:

"The supreme court, or a majority of the judges thereof, shall appoint a clerk for said court, who shall hold his office for six years, and until a successor is appointed and qualified."

It will be seen that the clerk of the Supreme Court is appointed for a definite term of six years. There is no question as to his being a state officer. The accepted definition of a public officer is found in the case of State ex rel v. Bus, 135 Mo. 1.c. 331. That definition is as follows:

"A public office is defined to be 'the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' Mechem, Pub. Offices, 1. The individual who is invested with the authority and is required to perform the duties is a public officer."

August 13, 1945

A portion of the sovereign function of government is invested by the statutes in the clerk of the Supreme Court. For instance, he is authorized to administer oaths (Section 1884), to preside at and certify to depositions (Section 1920) and to do many other things which need not be mentioned here. He is required to give a bond (Section 13285). It is clear, therefore, that the salary of the clerk of the Supreme Court cannot be increased during his term of office and that, therefore, H. B. 244 cannot be effective to increase the salary of the clerk during the term in which said bill becomes effective.

Said H. B. 244 not only provides an increase in salary of the clerk, but it also provides increases in salaries of his deputies. Section 13273, page 402, Laws of 1943, provides as follows:

"The Clerk of the Supreme Court shall hereafter receive a salary of Four Thousand Dollars; he may also employ not more than two deputies, who shall each receive a salary of Two Thousand Two Hundred Dollars per annum. * * * * *

Said section does not prescribe any term of office for said deputies. In that case, said deputies would hold during the pleasure of the clerk. In 46 C. J., page 964, it is said:

"Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power attempts to fix a definite term; and an officer removable at the pleasure of the appointing power has, in the strict meaning of the word, no 'term' of office."

Since the constitutional prohibition against increasing salaries only applies to officers having a fixed term, H. B. 244 does not violate said constitutional prohibition, in so far as the salaries of the deputies of the clerk of the Supreme Court are concerned. There is no objection to a bill that becomes effective as to some persons at one time and to other persons at another time. In State ex rel. v. Kansas City 310 Mo. 542, 561, the court said:-

"* * * Where not prohibited by the Constitution, the Legislature may direct that different parts of the same statute shall go into effect at different times, and even under constitutional pro-

visions requiring all parts of a statute to take effect at the same time, it is sufficient that the statute becomes effective as an entirety at one time, notwithstanding that, as to some persons or matters affected by it, the statute becomes operative at different times.
* * * * *

Said H. B. 244 will, therefore, increase the salaries of the deputies of the clerk of the Supreme Court when it becomes effective as a law.

The appointment of the marshal of the Supreme Court is provided for by Section 2049 R. S. No. 1939, which reads as follows:

"The supreme court shall appoint a marshal, and shall have power from time to time to fill any vacancy which may occur in such office. Such officer shall attend the sittings of the court, and shall have all the powers and perform all the duties enjoined by law on the officer attending courts of record, so far as may pertain to said court, and shall hold his office during the pleasure of the court."

While the marshal is designated an officer, he is not appointed for a definite term, and hence the constitutional prohibition against increasing his compensation during his term does not apply. Said H. B. 255 will, therefore, apply to the present marshal of the Supreme Court when it goes into effect.

As pointed out above, the effect of H. B. 264 is to increase the salary of the chief clerk and to provide certain limits for salaries of other employees. If the chief clerk is a state officer, then said act cannot be effective as to him. However, it should be noticed that by Section 10600, supra:

"The state superintendent shall be entitled to employ a chief clerk, * * *. The chief clerk shall perform such clerical and other work as may be directed by the state superintendent, and shall hold his office at the pleasure of the state superintendent."

The statute refers to the employment of a chief clerk, not to his appointment. Furthermore, it says that he is to perform clerical and other duties as directed by the state superintendent. He serves at the pleasure of the state superintendent, and so far as we can find, no statutes invest him with any of the functions of government. He is not required to take an oath nor to give bond. He clearly falls within the classification of an employee and not that of an officer. The constitutional prohibition does not prevent increasing the compensation of employees, and, therefore, H. B. 264 will apply to the present chief clerk of the State Superintendent of Schools when it becomes effective.

The other persons affected by H. B. 264 are likewise employees and not officers. No duties or authority are given them by law, but they work under the direction of the state superintendent. Furthermore, said bill does not increase the salaries of such other persons because no salaries had ever been prescribed by law for them. Even if such other persons were officers, said bill would not violate the constitutional provision against increasing the salaries of officers during the term when no salaries had ever before that been prescribed. In the case of *State ex rel v. Nolte*, 172 S. W. 2nd, 854, 856, the Supreme Court of Missouri said:

"A constitutional or statutory provision prohibiting a change of compensation after an election or appointment during the term of an officer does not apply where, prior to such time, no salary or compensation has been fixed for the office."

CONCLUSIONS

It is therefore the opinion of this office (1) that the emergency clauses in H. B. Nos. 244, 255, and 264 of the 63rd General Assembly are invalid and of no effect; (2) that all of said bills will become effective ninety days after the adjournment of the present session of the General Assembly unless said assembly should recess for thirty days or longer and should by a joint resolution provide that said bills go into effect ninety days after the beginning of such recess; (3) that H. B. 244 will not be effective to increase the salary of the clerk of the Supreme Court during the term in which said bill becomes effective, but it will be effective to increase the

salaries of his deputies immediately upon the bill becoming effective; and (4) that H. B. 255 and H. B. 264 will be effective as to the present incumbents of the respective offices and employments mentioned therein.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HHK:CP

STATE PURCHASING: Re: The State Purchasing Agent is un-
AGENT: authorized to trade in old equip-
ment for new or better equipment.

August 14, 1945



Mr. Wm. L. Smith
State Purchasing Agent
Capitol Building
Jefferson City, Missouri

Dear Mr. Smith:

In your letter of August 1, 1945, you requested an opinion of this office, which letter reads as follows:

"We have a requisition from the Northwest Missouri Teacher's College, Maryville, Missouri requesting us to purchase ten new Underwood Typewriters. They have ten obsolete typewriters of various makes, which they choose to trade-in for these new machines.

"We also had requests from other departments along the same line where they request trade-ins on calculators, typewriters, office equipment, etc. Also, trade-ins on automobiles has been another subject of inquiry by various departments.

"I would very much appreciate your opinion as to whether or not these trade-ins are legal."

We think there are two questions presented in your request.

(1). Is there any provision of the new Constitution of 1945 which would prohibit the trade-in transaction?

(2). Is the State Purchasing Agent authorized to make exchanges or trade-ins under Section 14589 and seq?

Section 15 of the Constitution of Missouri of 1945 provides

August 14, 1945

in part as follows: (Page 31)

"* * *All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state.* * *"

It is our opinion that the above Constitutional provision would not apply to the case of a trade-in transaction, since there would be no money received by the State. The old article would merely be used in order to reduce the purchase price of the new article.

However, there remains the question of the State Purchasing Agent's authority under the statutes creating his office, to trade in or exchange property.

Section 14590, R. S. Mo., 1939, provides as follows:

"The purchasing agent shall purchase all supplies except printing, binding and paper, as provided in chapter 120, R.S. 1939, for all departments of the state, except as in this chapter otherwise provided. He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the state."

Section 14591, R. S. Mo., 1939, provides, in part, as follows:

"All purchases shall be based on competitive bids. On any purchase where the estimated expenditure shall be two thousand dollars (\$2,000.00) or over, the purchasing agent shall advertise for bids in at least two daily newspapers of general circulation in such places as are most likely to reach prospective bidders at least five days before bids for such purchase are to be opened. On purchases where the estimated expenditure is less than two thousand dollars (\$2,000.00) bids shall be secured without advertising. In all cases, the purchasing agent shall post a notice of

August 14, 1945

the proposed purchase on a bulletin board in his office. He shall also on all purchases estimated to exceed two thousand dollars (\$2,000.00) solicit bids by mail from prospective suppliers. All bids for such supplies shall be mailed or delivered to the office of the purchasing agent so as to reach such office before the time set for opening bids. The contract shall be let to the lowest and best bidder. The purchasing agent shall have the right to reject any or all bids and advertise for new bids, or, with the approval of the governor, purchase the required supplies on the open market if they can be so purchased at a better price.* * *

Section 14592, R. S. Mo., 1939, provides, in part, as follows:

"No department shall make any purchase except through the purchasing agent as in this chapter provided.* * *

Section 14595, R. S. Mo., 1939, reads, in part, as follows:

"The purchasing agent shall have the power to transfer supplies from any department where they are not needed to any other department where they are needed and to direct that proper charges and credits be made on the appropriations of the departments concerned. He shall also have power, subject to the same provisions as for bids for purchases, to sell any surplus or unneeded supplies or property in his hands or owned by the state or any department thereof.* * * *

An examination of the statutes quoted above reveals that the State Purchasing Agent has the power to "sell" property owned by the State and, too, that the Agent must purchase and sell in a certain prescribed manner. The two main questions arising with regard to his authority in the instant situation, is whether the State Purchasing Agent can be said to have authority to make

August 14, 1945

such a transaction and whether, if he has such power, he can comply with the statute regarding bids.

In construing statutes the primary rule is to arrive at the legislative intent as expressed in the statute. *American Bridge Co. vs. Smith*, 179 S. W. (2d) 12. The primary rule of construction of statutes is to ascertain the lawmaker's intent from the words used, if possible. *City of St. Louis vs. Pope*, 126 S. W. (2d) 1201, *Artophone Co. vs. Coale*, 133 S. W. (2d) 343. Provisions not plainly written in a statute or necessarily implied will not be imparted or interpolated in order that the existence of a right may be made to appear when otherwise, on the face of the Act, it would not appear. *State ex rel. Mills vs. Allen*, 128 S.W. (2d) 1040, 344 Mo. 743; *Sayles vs. Kansas City Structural Steel Co.* 128 S.W. (2d) 1046. The entire statute must be considered in determining the meaning of any particular portion thereof. *De Jarnett vs. Tickameyer*, 40 S. W. (2d) 686. Those statutes which are in pari materia must be construed together. *State ex rel. McKittrick vs. Carolene Products Co.* 144 S. W. (2d) 253; *Holden vs. Elms Hotel Co.* 92 S. W. (2d) 620. The statute before us must be construed in the light of the above canons of statutory construction.

A reading of the statutes relating to the State Purchasing Agent reveals that there is no express power granted the agent to exchange or transfer property, except from one department of the State to another department of the State. Does the agent, then, have the power to make such a transaction under his authority to "sell"?

The Missouri courts have taken the position that a sale is distinguishable from an exchange, and that there must be a price in money paid for goods if the transaction is to be termed a sale. In *Freund Motor Co. vs. Alma Realty and Investment Co.* (1940 Mo. App.) 142 S. W. (2d) 793, a motor car company leased a sales room, garage and machine shop. The rental was to be one per cent of the total gross sales made by the company. The company took a used car in as part payment on a new car. It then sold the used car. The company paid the one per cent on the original new car transaction without deducting the value of the old car taken in on the trade. The court had before it the question of whether this used car trade-in was a transaction which came within the term "sale" as used in the lease. The court held that the one per cent should be paid only on the difference between new car sales price and the value allowed for the old car on the trade-in. The court said, l.c. 796:

"* * * However, the term, as ordinarily defined

August 14, 1945

in the books and as popularly understood, means the transfer of property for money paid or to be paid, and we think it is in this sense that the term is used in the lease with which we are here concerned. The taking of a used car in trade on the sale price of a new car is protanto an exchange or transfer of property for property, not a transfer of property for money paid or to be paid. * * #"

We think, therefore, that the trade-in transaction, under the Missouri law, is an exchange and not a sale. Since the authority to sell does not include the authority to exchange, (Tiffany on Sales, page 12) the statute authorizing the State Purchasing Agent to sell goods would not give him authority to exchange goods. There is thus no authority express or implied from the wording of the statutes, which gives the agent the authority to enter into a trade-in or exchange transaction, and such authority cannot be read into the statute. State vs. Allen, supra; Sayles vs. K. C. Structural Steel Co. supra.

Section 14595, supra, provides that the agent shall sell property subject to the same provision as for bids for purchases, which provisions are set out in section 14591, supra. The latter section, relating to the advertisement for bids, the notices necessary, and other details, must be complied with when the State Purchasing Agent sells any property. The Legislature has undertaken to prescribe the manner in which the State Purchasing Agent shall purchase and sell property. Having thus prescribed, it has made clear their intent that purchases and sales shall be made only in the manner prescribed.

Section 14595 must be read with section 14591, since the two are in *pari materia* relating to the same subject matter. Considered together we think the statutes reveal the intent of the Legislature to authorize only purchases and sales and not exchanges. Any other interpretation would render useless and of no effect the provisions of section 14591 requiring bids to be made and the property purchased or sold on the basis of such bids, since in most instances at least, this procedure could not be followed in a trade-in or exchange transaction.

CONCLUSION

It is, therefore, the opinion of this department that the

Mr. Wm. L. Smith

-6-

August 14, 1945

State Purchasing Agent is not authorized to exchange used property of the State and receive a reduction in the purchase price of new property, and that the State Purchasing Agent must comply with section 14591, R. S. Mo., 1939, when he disposes of used property.

Respectfully submitted,

SMITH N. CROWE, JR.
Assistant Attorney General

SNC:mw

APPROVED:

J. E. TAYLOR
Attorney General

HABEAS CORPUS: Effect of discharge on habeas corpus upon costs to be paid by state in subsequent proceedings against the same defendant.

August 22, 1945

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. O. L. Peters
Criminal Cost Clerk

Dear Sir:

Reference is made to your letter, dated June 18, 1945, requesting an official opinion of this office, and reading as follows:

"This Department desires an opinion from your Office with respect to the payment of Criminal Cost Bill, under the following circumstances.

"On June 11, 1940, this Department received from the Circuit Clerk of Iron County, Missouri, a duly certified Criminal Cost Bill in the Case, State of Missouri vs. Chas. Williams, No. 6655, showing the defendant charged with crime of robbery with deadly weapon. This Cost Bill was audited, allowed and paid July 9, 1940.

"Again on June 16, 1945 this Department received from the Circuit Clerk of Iron County another certified Cost Bill in this same styled and numbered case and on which is listed a number of the items of costs that were allowed and paid in the Cost Bill certified to this Department in June, 1940.

"We therefore kindly request an opinion from your Office as to what items of costs, if any,

August 22, 1945

shown in this last Cost Bill should be allowed and paid. We attach hereto for your convenience and information a copy of each of the Cost Bills certified to this Department in this case.

"Inasmuch as there will in all probability be other and similar Cost Bills submitted to this Department by reason of habeas corpus proceedings either in the Supreme Court or the Circuit Court of Cole County we further request an opinion from your Office as to what items of costs, if any, should be allowed and paid by the State in such cases."

The answer to the question you have proposed must be determined by giving due regard to the effect of the discharge on habeas corpus of the defendant. The general rule with respect to the effect of such proceedings is set forth in 22 C. J. S., Criminal Law, Para. 266, which reads as follows:

"A discharge on habeas corpus being merely from custody and not from the penalty, does not operate as an acquittal and is not a bar to a subsequent indictment whether accused has undergone any part of the punishment imposed or not."

To the same effect is State v. Schierhoff, 103 Mo. 47, 1. c. 50, 51, from which we quote:

"Defendant's second contention is, that having been discharged on writ of habeas corpus from imprisonment by virtue of an execution issued on the original judgment in this case, he cannot be confined again for the same offense, and in support of this contention he relies upon section 2670, Revised Statutes, 1879, being section 5398, Revised Statutes, 1889, and Ex parte Jilz, 64 Mo. 205. We do not think the Jilz case in point. There de-

defendant was released on habeas corpus, and he was again arrested and held for the same offense, on the same judgment. Here the defendant was released on habeas corpus from imprisonment by virtue of an execution issued in February, 1887, on the original sentence, entered December 23, 1885, upon the ground chiefly, that the court could not sentence him while the motion for new trial remained undisposed of.

"The court, after his release, however, proceeded in a very short time, to have him brought before the court and sentenced again, the motion for new trial having been previously overruled. This cured the defect, if there was any defect in entering the sentence originally, and any subsequent process issued under this final sentence would be for the same offense, it is true, but not on the same judgment, and such process is especially excepted in section 2670, supra. In order for a discharge under habeas corpus to operate as res adjudicata, the process must be for the same offense, and issued under the same judgment. Res judicata in such case cannot be pleaded 'when the discharge in any case has been ordered on account of the non-observance of any of the forms required by law, and the party is again arrested for imprisonment by legal process for sufficient cause and according to the forms required by law.' Sec. 2670, supra.

"The forms of law were not complied with in entering judgment against defendant, December 23, 1885, while his motion for new trial was pending, and he was rightly released from custody; but the next time he was imprisoned it was for the same offense, but on legal process issued on a new judgment rendered after such release. This very point is covered by the portion of section 2670 above quoted. This point is ruled against defendant."

August 22, 1945

That such is the rule in all jurisdictions further appears from the annotations in 97 A.L.R. 162N, in which State v. Schierhoff, supra, is analyzed. The effect of the rule is simply to declare that the custody of the defendant is void resulting from inherent defects in the trial proceedings.

The liability for the payment of criminal costs by the state is predicated upon the provisions of Section 4221, R. S. Mo. 1939, reading, in part, as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, * * * the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. * * * "

We note from the copy of the fee bill enclosed with your letter of inquiry that the defendant was convicted of the crime of robbery with a deadly weapon. Under the provisions of an act appearing in Laws of 1943, page 518, this crime is made a capital offense. Such act reads, in part, as follows:

"Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon shall suffer death, or be punished by imprisonment in the penitentiary for not less than five years, * * *."

Section 13405, R. S. Mo. 1939, relates to fees to be allowed to prosecuting attorneys, It reads, in part, as follows:

"Prosecuting attorneys shall be allowed fees as follows, unless in cases where it is otherwise directed by law: * * * for the conviction of every defendant in any case where the punishment assessed shall be by confinement in the penitentiary, except in cases of rape, arson, burglary, robbery, forgery or counterfeiting, ten dollars; for

August 22, 1945

the conviction of every defendant of homicide, other than capital, or for offenses excepted in the last clause, twelve dollars and fifty cents; * * *."

From the foregoing, it appears that the charge of \$12.50 as fees of the Prosecuting Attorney, J. H. Keith, is proper.

Section 13413, R. S. Mo. 1939, relates to fees to be allowed sheriffs for their services in criminal cases. It reads, in part, as follows:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

* * * *

"For committing any person to jail..... 1.00

* * * *

"For every trial in a criminal case or confession 1.00

* * * *"

Further, Section 13416, R. S. Mo. 1939, makes provision for the allowance to sheriffs for the board of prisoners. Such section reads, in part, as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: * * * "

Examination of the fee bill discloses that the fees claimed thereon on behalf of Ogie Selinger, Sheriff, are in accord with

August 22, 1945

the above statutes.

Section 13409, R. S. Mo. 1939, relates to the fees to be allowed clerks of circuit courts, and reads, in part, as follows:

"The clerks of the several courts of this state possessing criminal jurisdiction shall be entitled to the following fees for their services in criminal proceedings, and no fee in such proceedings shall be allowed by virtue of any other provision in this chapter contained:

* * * * *

"For entering any judgment * *50
* * * * *

"For copies of records and papers,
for every hundred words..... .10
* * * * *

"For each certificate and seal authenticating a copy of a record.. .50
* * * * *

"For a copy of a bill of costs in each case, and certificate of the judge and prosecuting attorney, including certificate and seal... .50

"For every order in a case not herein provided for15
* * * * *

"For copying bill of costs, after allowance, including certificate and seal, for every hundred words..... .10
* * * * *

"For certificate to an affidavit..... .15

* * * * *

Examination of the charges appearing on the fee bill on behalf of R. C. Jones, Clerk of the Circuit Court, discloses that the fees claimed thereon are in accord with the provisions of the statute quoted.

Hon. Forrest Smith

-7-

August 22, 1945

CONCLUSION

In the premises, we are of the opinion that all items of cost appearing on the fee bill attached to your letter of inquiry are in accord with the statutes relating thereto and should be allowed and paid.

Respectfully submitted,

Will F

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

SALARIES:

LIEUTENANT GOVERNOR:

Salary of Lieutenant Governor of the
State of Missouri.

October 17, 1945

FILED

83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion, which reads as follows:

"We are in receipt of a requisition from the Governor's office to pay the Lt. Governor of Missouri for acting as Governor during seven days of the month of July 1945.

"S. B. 168 which was approved on August 2, 1943, found on pages 869 and 870 of the 1943 Missouri Laws, provides among other things, that the Lt. Governor shall receive \$7,500 a year which amount shall constitute the total compensation for all duties to be performed by such officer and there shall be no further payment made to or accepted by said officer for the performance of any duty now required to be performed by said officer.

"I would like an opinion from your office as to whether we can legally pay the Lt. Governor for these seven days in which he served as Governor of Missouri during the absence of the Governor from Missouri."

Prior to the enactment of Senate Bill 168, passed by the 62nd General Assembly, found in Laws of 1943, pages 869-870, and referred to in your request, the Lieutenant Governor received his total salary and compensation under various laws

October 17, 1945

for services rendered to the State of Missouri.

Section 13397, R. S. Mo. 1939, provides that the Lieutenant Governor, as such, shall receive a salary at the rate of one thousand dollars per annum as full compensation for his services; also that when he shall act as Governor, he shall receive the salary of said office.

Section 18, Article V, of the Constitution, page 107c, R. S. Mo. 1939, provides that the Lieutenant Governor, while presiding in the Senate, shall receive the same compensation as shall be allowed to the Speaker of the House of Representatives.

Section 9158, R. S. Mo. 1939, provides that the Lieutenant Governor shall be a member of the Board of Probation and Parole, and shall receive as compensation for additional duties and services performed by him as such member, in addition to the salaries and fees allowed by law for his services as Lieutenant Governor, the same salary and expenses allowed by law to other members of said Board. The same statute provides that the other members of the Board shall receive a salary of three thousand dollars per annum and necessary expenses.

A well established rule of statutory construction is to ascertain the lawmakers' intent from the words used if possible and to put on the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and the manifest purpose of the statute. *Artophone Corporation v. Coale*, 133 S. W. (2d) 343, 345 Mo. 344.

Unquestionably, the intention of the Legislature, in passing Senate Bill 168, supra, was to abolish the many laws pertaining to the salary of the Lieutenant Governor and enact in lieu thereof a law providing one salary for all services rendered the State of Missouri.

Senate Bill 168, as passed by the 62nd General Assembly, Laws 1943, pages 869-870, reads as follows:

"Section 1. Salaries of State Officers. - That from and after the first day of January, 1945, the Governor shall receive an annual salary of \$10,000, the Lieutenant-Governor, the Secretary of State, the State Treasurer, the State Auditor, the Attorney-General shall each receive an annual salary of \$7,500, and

from and after the first day of January, 1947, the Superintendent of Public Schools shall receive an annual salary of \$7,500, said salaries to be paid at the times and in the manner now provided by law.

"The said salaries shall constitute the total compensation for all duties to be performed by said officers and there shall be no further payments made to or accepted by said officers for the performance of any duty now required to be performed by said officers or either of them under any and all existing laws.

"Section 2. Repealing conflicting laws. - All laws in conflict with the provisions of this act pertaining to the salaries, or compensation, of the officers named in Section 1 of this act are hereby repealed."

At the time Senate Bill 168 was passed, Section 16, Article V, of the Constitution of the State of Missouri, page 107c, R. S. Mo. 1939, was in effect, and authorized the Lieutenant Governor to act as Governor under certain conditions, and provided that when so serving as Governor, he was entitled to all the emoluments of the office of Governor. Said constitutional provision reads:

"In case of death, conviction or impeachment, failure to qualify, resignation, absence from the State or other disability of the Governor, the powers, duties and emoluments of the office for the residue of the term, or until the disability shall be removed, shall devolve upon the Lieutenant-Governor."

Furthermore, Section 11, Article IV, of the Constitution of 1945 also provides that on the death, conviction or impeachment, failure to qualify, resignation, absence from the state or other disability of the Governor, the powers, duties and emoluments of the Governor shall devolve upon the Lieutenant Governor for the remainder of the term or until the disability is removed, which provision is almost identical with the foregoing constitutional provision in R. S. Mo. 1939.

October 17, 1945

Another well established rule of statutory construction is that the unconstitutionality of part of a statute does not render the remainder thereof invalid where enough remains, after discarding the invalid part, to show the legislative intent and furnish sufficient means to effectuate it. State ex rel. McDonald v. Lollis, 33 S. W. (2d) 98, 526 Mo. 644.

Therefore, in view of the two foregoing constitutional provisions, we question the validity of Senate Bill 168, as passed by the 62nd General Assembly, as to that part providing that the salary specified therein shall be the total compensation for all services rendered.

CONCLUSION

Applying the above rule of statutory construction in State ex rel. McDonald v. Lollis, supra, we are of the opinion that the Lieutenant Governor is entitled to the salary provided in Senate Bill 168, \$7500.00 per annum, in lieu of all other compensation, except that provided for in the foregoing constitutional provisions while acting as Governor of the State of Missouri. In such case, he is entitled to all the emoluments of the office of Governor.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

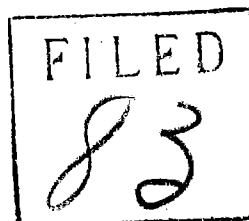
APPROVED:

J. E. TAYLOR
Attorney General

ARH:HR

TAXATION: Taxpayers engaged in the military service exempt
from the payment of penalties on delinquent state
SERVICEMEN: and county real estate and personal taxes.

October 18, 1945



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. B. E. Ragland, Chief Clerk

Dear Sir:

We are in receipt of your request for an official opinion from this department under date of October 18, 1945, which reads as follows:

"We have had several inquiries regarding penalties on unpaid state and county real estate and personal taxes of persons in the military service, we would appreciate an official opinion on the following:

"What period is a person in the armed services exempted from paying penalties on unpaid state and county real estate and personal taxes that have become delinquent?"

The provisions for the various county collectors to charge a penalty upon delinquent taxes are set out in Section 11124, R. S. Mo. 1939, which provides as follows:

"Between the first of January and the first of July in the year 1934 and annually thereafter, and immediately upon the effective date of this act, the county collector

shall make out and record, in a book to be provided for that purpose, a list of lands and lots, returned and remaining delinquent for taxes, including therein the delinquent taxes of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state returned delinquent to the county collector, separately stated, describing such lands or lots as the same are described in the tax books and said delinquent returns, as corrected under sections 11110 and 11114, and charging them with the amount of delinquent tax and naming the years delinquent, separately stated, and in addition thereto a penalty of ten per centum on such tax delinquent for the preceding year and an additional annual ten per centum on taxes for each year prior to the preceding year, and shall certify to the correctness thereof, with the date when the same was recorded, and sign the same by himself, or deputy, officially: Provided, however, if taxes are paid on land or lots delinquent for the preceding year at any time prior to sale thereof as in this law provided, the per centum of penalty added shall not exceed one per centum per month or fractional part thereof or ten per centum annually. * * * *"

The provisions for the collectors to collect the penalty on delinquent taxes of the state and county are set forth in Section 11085, R. S. Mo. 1939, which provides as follows:

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the col-

lector after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 11124. Collectors shall, on the day of their annual settlement with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor: Provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States, or against any taxpayer who shall pay his taxes to the collector at any time before the first day of January in each year: * *

(Emphasis ours.)

The above section expressly provides that no interest penalty shall be charged against persons who are absent from their homes and engaged in the military service of this state or of the United States.

Under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, under Title 50, Appendix Sec. 511, U.S.C.A., we find the following definitions:

"(1) The term 'persons in military service' and the term 'persons in the military service of the United States', as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. * *"

Although the above quoted definition was enacted by the Congress of the United States in 1940 and the language

October 18, 1945

"engaged in the military service of this state or of the United States" as used in Section 11085, supra, was originally used in Missouri in the Laws of 1872, page 106, we believe that the definition as set forth above in the Soldiers' and Sailors' Civil Relief Act of 1940 fairly defines the intention of the Legislature in the military service required as a condition for the exemption of the penalty on delinquent state and county taxes as set forth in Section 11085.

The provision in Section 11085, supra, which provides that interest shall not be charged against persons who are absent from their homes, and engaged in the military service of the United States, would indicate that the period of exemption from penalties would be from the time of the persons' induction or enlistment into the armed services and continue until the persons' discharge or release from the armed services.

CONCLUSION

Therefore, it is the opinion of this department that the collector of state and county taxes should not charge any penalty, as provided in Section 11124 R. S. Mo. 1939, against any taxpayer during the period that the taxpayer is absent from his home and engaged in the military service of this state or of the United States.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

6 p Mr. John
SCHOOLS:

Present statutes concerning bond issues are in conflict with Constitution of 1945 and govern until July 1, 1946.

FILED

83

October 26, 1945

11/7

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter under date of October 12, 1945, requesting our official opinion on a set of facts which may be briefly summarized, as follows:

A common school district voted for a bond issue on June 19, 1945. The bonds were printed and dated August 1, 1945. A question has arisen as to whether the indebtedness should be based on the assessment for 1942 or for 1943, and whether intangible personal property may be included in computing the assessed valuation for those years, since the new Constitution provides that the indebtedness may not exceed a percentage of the tangible taxable property in the county assessed for taxation purposes. The election was apparently called under the provisions of Section 12, Article X, of the Constitution of 1875, and Sections 10328, 10329, 10330 and 10331, R. S. Mo. 1939.

Section 10328, R. S. Mo. 1939, and the three subsequent sections present the complete plan for the issuance of bonds to erect or repair school buildings, pay off assessments made by other taxing authorities, relating to the maintenance of sewer and drainage systems, and to purchase schoolhouse sites. They were enacted to carry out the bonding and assessment plan set out in Section 12, Article X, of the Constitution of 1875. As originally enacted, Section 10331 immediately followed Section 10328, and the words "preceding section" in

the former referred to the latter section, the two intervening sections being enacted in 1931.

Section 10331 is, in part, as follows:

"The loan authorized by the preceding section shall not be contracted for a longer period than twenty years, and the entire amount of said loan shall at no time exceed, including the present indebtedness of said district, in the aggregate five per cent of the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of said indebtedness, * * * "

The wording of this statute has been discussed in several decisions in this state. The words "last assessment" refer to the last completed assessment as corrected and approved by the State Board of Equalization. In *State ex rel. v. Wabash Railroad Co.*, 251 Mo. 134, we find the following, l. c. 142:

"The Supreme Court of Illinois (*Culbertson v. City of Fulton*, 127 Ill. 30), in construing a constitution which used the word 'last assessment,' held that said words meant the last completed assessment as corrected and approved by the State Board of Equalization, and not the assessment by the local assessor, whose work had not yet received the approval of said State Board of Equalization.

* * * * *

"In the case of *Chicago, Burlington & Quincy Railroad Co. v. Village of Wilber*, 63 Neb. 624, the Supreme Court of Nebraska construed the words 'last preceding assessment' to mean an assessment which had been completed by receiving the approval of all the agencies through which it was required to pass.

"We find the reasoning of the foregoing cases is sound, and that the county court of Montgomery county could not base its tax levies upon returns made by the officers of railroad companies, which returns had not been passed upon by the State Board of Equalization."

Also, in State ex rel. City of Dexter v. Gordon, 251 Mo. 303, we find reference to the phrase "assessment next before the last assessment." In that case the question for determination was whether a bond issue voted on the 5th day of August, 1912, was to be limited by the assessment made in 1910 or that made in 1909. The State Board of Equalization had not finally certified and equalized the assessment of taxable property made in 1911, and was still in session, actually completing its duties on the 1st day of September, 1912. The court determined that the assessment made as of June 1, 1909 must govern, stating, l. c. 309:

"The 'assessments' designated in the Constitution as necessary to be considered in determining the per centum of indebtedness, mean the two successive, antecedent, completed assessments made by the State Board of Equalization previous to the incurring of the indebtedness. (Culbertson v. Fulton, 127 Ill. 30, l. c. 37; Wilkinson v. Van Orman, 70 Iowa, 230; Prickett v. Marceline, 65 Fed. 469; Railroad v. Wilber, 63 Neb. l.c. 627.) This must be true, for until the State Board of Equalization has completed its labors the total amount of taxable property in any subdivision cannot be determined.
* * * *

"On completed assessments, therefore, the constituted authority of any subdivision must base its action in determining the per centum of indebtedness. By way of illustration, if it was proposed to authorize the incurring of an indebtedness in 1912, and the assessment as of June 1, 1911, had not been completed, the taking of the assessment as of June 1, 1910, as the basis, would not be

October 26, 1945

in compliance with the Constitution, for the reason that the assessment required to be taken is that of June 1, 1909."

The bonds were held to be void because in excess of the limits permissible under the 1909 assessment, although well within the limits permissible under the 1910 assessment.

This rule has been approved in the more recent case of State ex rel. Jamison v. St. Louis-San Francisco Ry. Co., 318 Mo. 285, where we find the following:

"The term 'last assessment' means the last completed assessment. * * *

"The term 'last assessment' is merely an arbitrary measuring rod which is not necessarily accurate at the time it is applied. In fixing the limit of indebtedness under Article X, Section 12, the 'assessment next before the last assessment' is used as the measuring rod, notwithstanding the actual assessed value in the taxing district may have markedly increased or decreased between the date of such 'assessment next before the last assessment' and the time when the particular bonds are voted."

It has been ascertained that the State Board of Equalization is still in session at this date and will not complete its work until December 31, 1945, for the assessment made in 1944. In view of that fact, and applying the rule in the above decisions, using "the time when the particular bonds are voted," as suggested in the last decision above, which was June 19, 1945, the bond issue must not represent an indebtedness exceeding five per cent of the value of the taxable property in the school district referred to, based on the assessment of June 1, 1942.

As to your question as to whether intangible property may be included in determining the value of the property in the district, we believe Section 10331 to be plainly in conflict with Section 26(b) of Article VI of the Constitution of 1945, which is as follows:

October 26, 1945

"Any county, city, incorporated town or village, school district or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per centum of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

In the event of conflict between existing laws and the Constitution of 1945, Section 2 of the Schedule declares that such inconsistent laws remain effective. The pertinent part of Section 2 of the Schedule is as follows:

"* * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Unless sooner repealed or amended by the Legislature, Sections 10328 to 10331, inclusive, R. S. Mo. 1939, will remain in effect until July 1, 1946.

CONCLUSION

It is, therefore, our conclusion that bonds issued by a common school district in pursuance to an election held in 1945, and prior to the completion of equalization and revision of the 1944 assessment by the State Board of Equalization, representing an indebtedness not in excess of five per cent of the value of the taxable property, including intangible property, in the issuing district, based on the assessment of June 1, 1942, are valid, if they comply with the law in all other respects.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

2 P Smith

SHERIFFS: Sheriffs and deputy sheriffs not allowed
DEPUTY SHERIFFS: witness fees in criminal cases, unless
WITNESS FEES: they reside five miles or more from
place of trial; not allowed witness fees
in court upon which they attend.

October 27, 1945

FILED

83

Honorable J. P. Smith
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Sir:

Receipt is acknowledged of your letter dated October 18, 1945, in which you requested an official opinion of this office and which reads as follows:

"I kindly ask you to give me an opinion as to Sheriff, or his Deputy charging fees when they are used as Witnesses in Criminal Cases, in Courts that they are waiting on as officer?"

Attention is invited to Section 4232, R.S. Mo. 1939, which reads as follows:

"No officer, appointee or employee holding a state, county, township or municipal office, including police officers and policemen, either by election or appointment, shall claim, be allowed or receive any fee or compensation as a witness for testifying before a coroner's inquest, grand jury, or in any criminal cases. All officers, appointees and employees as aforesaid, shall be compelled to attend the trial of all criminal cases, coroner's inquests and grand juries, when legally subpoenaed: Provided, that the provisions of this section shall not apply to any officer who is a witness in any case

October 27, 1945

where the residence of such officer is five miles from the place where the trial or coroner's inquest is held, or where the grand jury is in session."

The sheriff and the deputy sheriff are officers and fall within the class designated in the above quoted section. The sheriff is an elective officer of the county, and the deputy sheriff is an appointive officer of the county, appointment being made by the sheriff.

The wording of the statute is clear and concise in stating that no such officers shall be allowed witness fees for testifying in criminal cases.

There is an exception in Section 4232, supra, which allows an officer witness fees for testifying in criminal cases where the officer's residence is five miles or more from the place where the trial is to be held. Consequently, a sheriff or deputy sheriff whose residence is five miles or more from the place where the trial is held, and who is subpoenaed as a witness, is entitled to receive witness fees, as provided in Section 13420, R.S. Mo. 1939.

The following quotation defining the word "residence" is taken from Volume 54 C. J., page 706:

"'Residence' is a noun, the name of a place or thing, and has been defined as an abode, dwelling, habitation, or place where one actually lives; a dwelling house where a person lives in settled abode; the dwelling place of a person; * * * *"

I do not believe that it was intended that sheriffs and deputy sheriffs receive witness fees for testifying in courts upon which they are attending in fulfilling their duties as provided by law, though they reside five miles from where the court is being held.

The basis for allowing witnesses' fees is to compensate them for any inconvenience suffered incident to attending court, but a sheriff or deputy sheriff attending upon a court because it is his duty as provided by law is not inconvenienced by being there, though he may live five miles or more from the court. Consequently, under such circumstances no fees could be allowed.

Honorable J. P. Smith

-3-

October 27, 1945

The sheriff or his deputy can only be allowed witness fees in criminal cases when the court is five miles or more from their residence and is not the court upon which they are required by law to attend.

Conclusion.

Therefore, it is the opinion of this office that sheriffs and deputy sheriffs are not allowed witness fees for testifying in criminal cases, unless their residence is five miles or more from the place where the trial is held. The sheriff or deputy sheriff should never be allowed witness fees for testifying in criminal cases in a court upon which they attend as required by law, though their residence is five miles or more from the court.

Respectfully submitted,

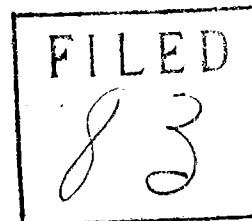
RICHARD F. THOMPSON
Assistant Attorney General

RFT:ml

APPROVED:

J. E. TAYLOR
Attorney General

TAXATION: Lien of city for delinquent taxes on property is on a par with that of county.



October 29, 1945

11/7

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of October 8, 1945, requesting our official opinion on a set of facts submitted to you by the County Collector of Lafayette County, Missouri, which is as follows:

"(1) Last year at the sale several properties were purchased by Mr. Duebbert, Trustee for the County, Deeds for these properties were made by me as Collector to Mr. Duebbert, Trustee, on November 15th, 1944, same were duly recorded. Now, the City Officials of Higginsville, Mo., are advertising for sale some of the properties heretofore sold to Mr. Duebbert, Trustee. We would want to know if the City has the authority to sell them for delinquent city taxes, the properties in question are now owned by the County. Some two or three tracts sold by me to Mr. Duebbert, Trustee, have since been sold by the Trustee to other individuals. In connection with the information desired, will you advise us our exact position.

"(2) This year we have some properties at Higginsville that we are to offer for sale on account of delinquent County & State taxes. The City of Higginsville is also advertising these properties for sale on account of delinquent City taxes. In this con-

October 29, 1945

nection we would want to know our exact position. At our sale the properties will be either purchased by some individual, or Mr. Duebbert as Trustee. At the sale conducted by the City of Higginsville, the same property may be bid in by some other individual. Which sale has the precedence, and which purchaser will be the rightful purchaser. We would like to have a reply before November 5th, so that we can confer with the City Officials of Higginsville before the date of the sale."

Section 11109, R. S. Mo. 1939, fixes the lien of the state for taxes due and unpaid on any real estate. That section is as follows:

"The taxes due and unpaid on any real estate which has heretofore been returned delinquent, and which has not been forfeited to the state, and the taxes due and unpaid on any real estate which has been forfeited to the state for the nonpayment of such taxes, shall be deemed and held to be back taxes, and the lien heretofore created in favor of the state of Missouri is hereby retained on each such tracts and lots of real estate to the amount of the taxes due thereon, and also the interest and costs accruing under this chapter."

A lien is also created in favor of the state for all taxes due any city, incorporated town, or school district, by Section 11206, R. S. Mo. 1939, which is as follows:

"Real property shall in all cases be liable for all taxes due any city or incorporated town or school district, and a lien is hereby created in favor of the state of Missouri for all such taxes, the same as for state and county taxes, which lien shall be enforced as in this chapter provided."

October 29, 1945

By Section 11207, R. S. Mo. 1939, the lien so created is assigned to the city in interest. That section is as follows:

"A lien, such as is now provided for by law in favor of the state for taxes due and unpaid on real estate, is hereby created in favor of such cities aforesaid, for taxes due thereon and for all interest and costs accrued thereon or incurred under this chapter: Provided, that all liens now existing in favor of said cities, by virtue of their charters, are hereby retained, and the same may be enforced in like manner and with like effect as provided for in this chapter."

Under our statutes, therefore, the lien of the city is on an equal basis with that of the state and county for taxes due and unpaid on any tract of real estate. The State Supreme Court has followed this view in *State ex rel. McGhee v. Baumann*, 160 S. W. (2d) 697. After referring to the statutes above quoted, that decision states, 1. c. 699:

" * * * The wording of these sections indicates that the lien for general city, town and school taxes is on an equality with the lien for general state and county taxes and that is the general rule. 26 R.C.L. page 404, sec. 361."

That decision also holds that the lien for each year is on a parity with that for every other year until barred by limitations. After pointing out that in some decisions in this state it was held that the last special tax bill issued constituted a prior lien over former tax bills, subsequent opinions were cited with approval in which it was held that the sale for general taxes for one year does not divest the state of its lien for unpaid taxes for a previous year, and the court concluded:

"But under existing Missouri statutes we do not believe we are authorized to hold that the lien for general taxes takes precedence in the reverse order of accrual."

After pointing out that under the Jones-Munger Act, sales for state and county taxes are made by the county collector and sales for city taxes are made by the city collector under a different advertisement, the court proceeded to determine the question at hand, in the following language, l.c. 699:

"One purpose of Sections 11149 and 11152 evidently is to prevent a sale by the county collector from destroying the lien for city taxes and to prevent a sale by the city collector from destroying the lien for state and county taxes, both liens being on an equality. Section 11152 requires the purchaser, before receiving a deed, to pay prior unpaid taxes, but, as the county collector is not authorized to receive city taxes and the city collector is not authorized to receive state and county taxes, Section 11149 makes the deed subject to such unpaid prior taxes as the collector is not authorized to collect. That is, the deed of the county collector is subject to prior unpaid city taxes and the deed of the city collector is subject to prior unpaid state and county taxes."

It would appear from the above that a purchaser of the lien of the state and county must satisfy the lien of the city, after securing his tax deed from the county collector, before being able to obtain the property free from liens, and that the same would be true of a purchaser of the tax lien of the city. If the sales by the city and county were on different dates, the purchaser at the earlier sale, upon securing his deed two years later from the collector of the city or county, as the case might be, would obtain such color of title as would enable him to redeem the property from the lien of the other taxing authority.

CONCLUSION

It is, therefore, our conclusion that a city has authority to sell property for delinquent city taxes to satisfy its

Honorable Forrest Smith

-5-

October 29, 1945

lien, even though the property involved may have been purchased by a county through its trustee at a tax sale, since such county would acquire only the tax lien foreclosed by such sale.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

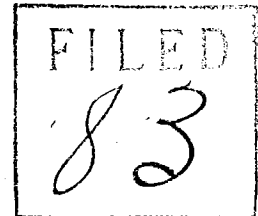
J. E. TAYLOR
Attorney General

RLH:HR

APPROPRIATION BY GENERAL ASSEMBLY:

Appropriation to the Board of Trustees of Public School Retirement System of Missouri is constitutional as being made for a state purpose.

November 3, 1945



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This department is in receipt of your request for an opinion upon the following state of facts:

"In Section 85 of HB 428 there is an appropriation of \$29,000 which is in the form of a loan to the Board of Trustees of the Public School Retirement System.

"We would like an opinion as to the constitutionality of this section or whether we can legally pay out any part of this \$29,000 as provided for in this section."

Section 85 of House Bill 428 is as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Twenty-nine Thousand Dollars (\$29,000.00), or such part thereof as may be necessary for the use of the Board of Trustees of the Public School Retirement System of Missouri, from July 1, 1945, to June 30, 1946, to enable it to put into effect the provisions of House Bill No. 151, enacted by the 63rd General Assembly, approved by the Governor on May 24, 1945. Provided, that the above funds shall be repaid into the State Treasury, credited

to the General Revenue Fund not later than July 1, 1947."

In order to determine whether or not the General Assembly may so appropriate from the general revenue fund, it is necessary to determine whether its authority to make such an appropriation is denied by the Constitution.

It is a fundamental principle of law that the people in the Constitution of the State or the Legislature in the exercise of its general legislative power, when not restricted by the federal or state constitution, may adopt such laws as they see fit. The case of *Harris v. Compton Bond & Mortgage Co.*, 149 S. W. 603, 1. c. 609, says:

"* * * The Legislature is vested with the whole power of the state, in the absence of some such constitutional limitation, and may establish any public or municipal corporation it deems necessary or expedient in the public interest. It may also confer upon such corporations such public power and authority as it may deem wise and best. Moreover, it may not only create such public corporations, but it may also change, divide, and abolish them at pleasure.

"Judge Dillon, in discussing this subject, said: 'Subject to constitutional limitations presently to be noticed, the power of the Legislature over such corporations is supreme and transcendent. It may, where there is no constitutional inhibition, erect, change, divide, and even abolish them at pleasure, as it deems the public good to require.' 1 Dillon on Municipal Corporations (5th Ed.) Sec. 92, p. 143.

"'Parliament may create new corporations or abolish or alter charters or impose new ones at its will, and without the consent of the inhabitants. And so may the state Legislatures in this country, if there be no constitutional restriction upon the power.' 1 Dillon on Municipal Corporations (5th Ed.) Sec. 92, p. 181."

Also, Sluder v. Transit Co., 189 Mo. 107; State v. Field, 17 Mo. 529, 1. c. 532.

The purpose of the establishment of the Public School Retirement System of Missouri is to provide retirement allowances and other benefits for the public school teachers. In order to determine whether the Legislature is denied the power to appropriate moneys from the state funds for such purpose, we must search the Constitution.

Under the title dealing with "Limitation on Legislative Power" is found the limitation of withdrawals to appropriations, Section 36, Article III, Constitution of Missouri, 1945, as follows:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:

"First: For payment of sinking fund and interest on outstanding obligations of the state.

"Second: For the purpose of public education.

"Third: For the payment of the cost of assessing and collecting the revenue.

"Fourth: For the payment of the civil lists.

"Fifth: For the support of eleemosynary and other state institutions.

"Sixth: For public health and public welfare.

"Seventh: For all other state purposes.

"Eighth: For the expense of the general assembly." (Underscoring ours)

With regard to this section the Supreme Court of Missouri has held in the case of State ex rel. Davis v. Smith, 335 Mo. 1069, that the power of the General Assembly with respect to public funds raised by general taxation, subject to constitutional limitations, is supreme. The court said (l. c. 1072):

"Relator makes a contention that the power of the General Assembly with respect to the public funds raised by general taxation, subject to express constitutional limitations, is supreme. In this connection it is also contended that the Constitution does not restrict the power of the Legislature to make appropriations from the general revenue to compensate public officers for services rendered the public and reimburse them for expenses incurred in the performance of such service."

"We agree that the power of the Legislature over these matters, subject to constitutional limitations, is supreme. * * * #"

Section 38 (a), Article III, Constitution of Missouri, 1945, concerns the limitations of the use of state funds by the General Assembly, and reads as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during this service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

The limitation placed on the use of state public funds by the General Assembly is that they may not use these funds regarding private persons, associations or corporations, with exceptions.

We are directly confronted with the problem, at the present, of whether the recipient of the appropriation described in Section 85 of House Bill No. 428, falls under any such classification, and we will therefore attempt to determine the status of the Public School Retirement System of Missouri.

House Bill No. 151, referred to in Section 85 of House Bill No. 428, declares that such system is to provide allowances and other benefits for public school teachers. It is a corporate body, which, by and in the name of the Public School Retirement System of Missouri, may sue and be sued, transact all business, invest all its funds and hold all its cash, securities, and other property. The system includes all school districts in the state except those in cities of 75,000 population or more. Administration of the system is vested in a board of trustees consisting of five members, two of whom are appointed by the State Board of Education, two of whom are elected by members of the Retirement System, and the remaining member is the State Superintendent of Public Schools or Commissioner of Education.

The Trustees are commissioned by the Governor and are required to take and subscribe to an oath to support the Constitution of the United States and of Missouri, which oath is filed in the office of the Secretary of State of Missouri. The Board of Trustees may formulate and adopt rules and regulations, subject to the limitations of the act. The Board is empowered, by the Legislature, to hold hearings in carrying out its business, and appeals from its decisions go to the circuit court. Records of such proceedings are open to the public. Headquarters is established in Jefferson City with office space provided by the Board of Permanent Seat of Government. The Attorney General is the legal adviser of the Board of Trustees and represents the Board at all legal proceedings. The State Auditor audits the records and accounts of the system.

Funds required for the operation of the system come from contributions made in equal amounts by members of the system and their employers, and from interest derived from the investment of any part of such contributions. All members of the system are required to contribute, and failure to transmit such contributions to the Board of Trustees constitutes a misdemeanor

and upon conviction thereof the party shall be fined not less than \$25.00 and not more than \$200.00. The rate of contributions is set out in the act. All funds thus arising belong to the Retirement System and are not revenue collected or moneys received by the state and are not to be commingled with the state funds. The Board is restricted by the Legislature as to how these funds may be invested.

All employees of public school districts, as defined in the act, are members of the system. The act provides for retirement of these members under various circumstances.

This, in brief, is a resume of House Bill No. 151, which we will also discuss later.

In establishing this system the Legislature has seen fit to designate it as a "body corporate," and it being a corporation we must determine under what class of corporations it falls. If it is a private corporation the appropriation of Section 85 of House Bill No. 428 must fall under Section 38 (a), Article III, Constitution of Missouri, 1945.

McQuillin on Municipal Corporations, 2d Ed., Vol. 1, Sec. 125, page 371, states that a strictly private corporation is one which has as its direct object the promotion of private interests such as banking, insurance, trading and manufacturing.

The case of Head v. Curators of the University of the State of Missouri, 47 Mo. 220, 1. c. 224, states:

"* * * The State established an institution of its own, and provided for its control and government, through its own agents and appointees. The act creating the institution, in its first section, declares that a 'university is hereby instituted in this State, the government whereof shall be vested in a board of curators.' The university is then (Sec. 2) declared a 'corporation and body politic' and invested with certain powers. These powers are given into the hands of a board which was made subject to the pleasure of the Legislature. This is not the way in which a private corporation is brought into being and endowed with corporate franchises. A private corporation involves the idea

of private parties and private rights. No such parties or rights were concerned in the institution of the University of the State of Missouri. By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. * * *

The case of *Washingtonian Home v. Chicago*, 157 Ill. 414, 41 N. E. 893, holds in brief that a corporation composed of private individuals, not restrained by law in conducting its business for private benefit, which does not report to and is not inspected by the state, elects its own managers without the state's approval, and by law owes the state no duty, is a private corporation within the provisions of the Constitution of Illinois forbidding donations to private corporations.

There are certain requirements to be fulfilled in order to bring a private corporation into being, but this system was not so established. The Retirement System is a creature of the Legislature, restrained by law in conducting its business, inspected by the state, does not elect its own managers without the state's approval, it does owe the state duties, and has as its object the promotion of a public interest. We conclude that it is not a private corporation and therefore Section 38 (a), Article III, Constitution of Missouri, 1945, is inapplicable.

Section 25, Article VI, Constitution of Missouri, 1945, reads:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may

authorize any city of more than 100,000 inhabitants to provide for the pensioning of other employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

This section is a limitation on the use of credit and grant of public funds by local governments, with certain exceptions which the General Assembly may authorize. However, the funds with which we are concerned are those of the state and therefore this section is inapplicable.

Another section relating to a retirement fund of any description (except the exemption under Section 38(a), supra), is found under Article IV, "Executive Department," subheading "Highways," Section 30, of the Constitution of 1945. This provision deals with the funds collected for the purpose of maintaining the Highway Department, and states that the funds realized from taxation for that purpose shall stand appropriated for direct uses, except . . . and among those exceptions is the provision numbered "(5)", which says:

"* * * less the cost, * * * (5) of the share of the highway department in any retirement program for state employees as may be provided by law, * * *"

This could be said to give the Legislature implied authority to appropriate funds for a Public School Retirement System which might be put into operation by law. However, the Supreme Court of Missouri, in the case of State ex rel. Heaven v. Ziegenhein, 144 Mo. 283, 1. c. 291, 45 S. W. 1099, laid down a rule to follow in construing Constitutions as to the proper or improper use of public funds. The court in that case said:

"The courts should not search for plausible reasons and specious pretexts to evade and set aside constitutional prohibitions against the improper use of public funds, and thereby unnecessarily

increase the burdens of taxation. Upon the contrary, all such provisions in the organic law of the State should be enforced and made effectual according to their plain meaning and intent.

"We are not unmindful of the important services rendered by the officers of the police force and of the benefits derived from their faithfulness in protecting and guarding the lives and property of the citizens. They are officers of the State, however, and the Constitution has declared that, like all others holding official stations, they must rest content with the remuneration fixed by law, and after their services have been performed, no matter how valuable they may have been, the city can not, as a gratuity or pension, 'grant public money to or in aid of any individual,' and the courts have no power to require it to be done. A peremptory writ must be denied."

The only remaining constitutional limitation which bears on this question is Section 39 (1), Article III, Constitution of Missouri, 1945, which reads:

"The general assembly shall not have power:

"(1) Use of State Credit in Aid of Others.--To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;"

This section has been construed by the Supreme Court of the United States in the case of *Cole v. City of LaGrange*, 5 Sup. Ct. 416, 113 U. S. 1, 28 L. Ed. 896, 1. c. 898, where Mr. Justice Gray said:

"The 13th section (same as above) peremptorily denies to the state the power

of giving or lending its credit to, or becoming a stockholder in, any corporation whatever." (In parenthesis ours)

We can see no grounds upon which to suppose that a debt has been created against the state by this act. On the contrary, the state is appropriating funds to the Retirement System, which funds are to be returned by it to the state within a stipulated period of time. Therefore, Section 39 (1), Article III, supra, is also inapplicable.

We have reviewed all of the provisions of the Constitution of Missouri, 1945, which we believe applicable, and find no restriction that such purpose as is undertaken in House Bill No. 151, is not within the scope of the legislative power of the General Assembly.

We have hereinbefore pointed out that the system is a corporation, and it is also, in our opinion, such corporation as would fall under the classification of being a state agency.

McQuillin on Municipal Corporations, 2d Ed., Vol. 1, Sec. 125, page 369, in talking of public corporations, states:

"First, public corporations, variously styled public, political, civil and municipal, created by the sovereign power for public or political purposes, having for their object the administration of a portion of the powers of the state, as counties, townships, parishes, schools, reclamation, irrigation, road, levee, drainage, sanitary, fire and taxing districts, cities, towns, villages, and boroughs, or municipal corporations, full or quasi-corporations, invested with certain specified subordinate powers, to be exercised for local purposes connected with, and designed to promote, the public good. Public corporations are not only creations, but instrumentalities of the state, and are subject to visitation and control."

The Retirement system was created by the Legislature of the state and has as its purpose the establishment of the

public school retirement scheme, which is most certainly for the public good. The Board of Trustees is empowered to administer the system which, as we have pointed out before, is a portion of that which the state itself could undertake. The system, being created by the Legislature, is also under the control of the state and, this being so, is an instrumentality of the state since it is subject to such control. The Legislature may amend or alter the act creating the system and may also do away with the system. All school districts in the state, except those in cities of 75,000 population or more, are in the system. Of course, these school districts have been held to be state agencies often. The case of *State ex inf. McKittrick v. Whittle*, 333 Mo. 705, 1. c. 709, states:

"Respondent next contends that a school district is not a political subdivision of the State. The authorities are to the contrary. It is defined by a standard text as follows:

"A school district, or a district board of education or of school trustees, or other local school organization, is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools.' (56 C. J. 193.)

"This definition is approved by this court in *State ex rel. v. Gordon*, 231 Mo. 547, 1. c. 574, 133 S. W. 44, in which we said:

"A school district is but the arm and instrumentality of the State for one single and noble purpose, viz., to educate the children of the district--a purpose dignified by solemn recognition in our Constitution (Sec. 1, Art. 11), reading: 'A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State

between the ages of six and twenty years." In obedience to that constitutional mandate, the General Assembly has established such schools and given over to school districts, acting through boards of directors, the single duty and authority to maintain them.'

"In City of Edina to use v. School District, 305 Mo. 452, 1. c. 461, 267 S. W. 112, we also said:

"Under the Constitution of 1875, the public schools have been intronched as a part of the State Government, and it is thoroughly established that they are an arm of that government and perform a public or governmental function, and not a special corporate or administrative duty. They are purely public corporations, as has always been held in counties in this State."

The present system is therefore composed of boards which are already classified as state agencies. Nor does the fact that the Board of Trustees is not appointed by the Governor, by and with the advice and consent of the Senate, alter the status of the organization since such appointment is not essential to the establishment of a state agency.

The system is supported by contributions which are mandatory and, in effect, the General Assembly has empowered the Board of Trustees to assess all of the members of the system, which lends strength to the fact that such system is a state agency.

Therefore, since the Public School Retirement System of Missouri is a creature of the state, under its control, its trustees commissioned by the Governor, represented by the Attorney General's Office, audited by the State Auditor, and subject to the control of the state, we are of the opinion that it is a state agency. As such, it is within the power of the General Assembly to appropriate state funds to it as is undertaken in Section 35, House Bill No. 428.

Hon. Forrest Smith - 13

Conclusion

The Public School Retirement System of Missouri is a state agency and such appropriation as is undertaken by Section 85, House Bill No. 428, is therefore constitutional, it being within the power of the General Assembly to appropriate state funds for state purposes.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

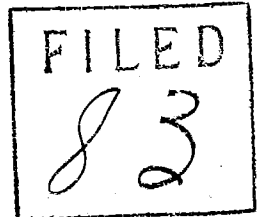
J. E. TAYLOR
Attorney General

JMA:EG

CONSTITUTIONAL LAW: Sections 29 and 52, Art. III, Constitution of 1945, must be read together in determining effective date of bills.

LEGISLATION: Emergency clauses in S. B. 85, 86 and 87, 63rd General Assembly invalid. Said bills will be effective to increase the compensation of persons serving at the time said bills become effective.

November 9, 1945



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date, which reads as follows:

"Senate Bill 85 duly passed and signed by the Governor provides for increasing the salary of the Superintendent of the State Sanitorium at Mt. Vernon.

"Senate Bill 86 provides for increases in salaries of superintendents of hospitals.

"Senate Bill 87 provides for increasing salaries of the staff physicians of the various hospitals.

"Each of these three bills carry a purported emergency clause.

"I would like a written opinion from your office as to when these increases become legally effective."

As stated in your letter, each of the three bills inquired about contains a purported emergency clause. Two sections of the Constitution must be considered in determining the validity of such emergency clauses. Said sections are Nos. 29 and 52 of Art. III, and they read as follows:

"Section 29. No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that the laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

"Section 52. A referendum may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools) either by petitions signed by five per cent of the legal voters in each of two-thirds of the congressional districts in the state, or by the general assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly which passed the bill on which the referendum is demanded. * * * * * Any measure referred to the people shall take effect when approved by a majority of the votes cast thereon, and not otherwise."

While Section 29, supra, provides that an act may go into effect sooner than ninety days after the adjournment of the legislature "in case of an emergency," yet Section 52 provides that all laws except those "necessary for the immediate preservation of the public peace, health or safety" (and some others not material to our discussion

here) shall be subject to referendum at any time within ninety days after the adjournment of the legislature. As we shall hereinafter point out, the courts have always construed these two constitutional provisions together and have held that the emergency referred to in Section 29 must be such as makes it "necessary for the immediate preservation of the public peace, health or safety" that a statute go into effect sooner than ninety days after the adjournment of the legislature.

The Supreme Court of this state some 25 years ago had occasion to consider two almost identical provisions of the constitution of Missouri in the case of *State ex rel. v. Sullivan*, 283 Missouri 546, 224 S.W. 327. In that case the court said (224 S.W. 1. c. 337):

"The next contention is that although we may rule that the usual emergency clause of a measure may not prevent its reference, as we have ruled above, yet it is contended that the expressions in section 81 of the measure before us are such as to amount to a legislative declaration that the measure is one 'necessary for the immediate preservation of the public peace, health, or safety,' and that the courts cannot go back of such legislative declaration.

"In the first place the language in said section 81 of the act of 1919 (Laws of 1919, p. 484) is not such a legislative declaration, and with this the matter might end. In a valuable note in 36 Cyc. p. 1194, it is well said:

"Under a constitutional provision for the submission of acts to the people before their taking effect, 'except as to laws necessary for the immediate preservation of the public peace, health or safety,' a clause intended to put them in effect before the time prescribed by the general law must not only declare an emergency, but must also set forth such an emergency as described in the above-quoted provision of the Constitution.'

"This emergency clause touches neither side nor bottom, when measured by this rule. But both sides urge and discuss the larger question, as to whether or not such legislative declaration would foreclose the matter in the courts. Upon this question the courts are divided, and in our judgment, some have been lead into error by reason of court rulings upon mere emergency declarations. Before the days of initiations and referendums all the state constitutions contained sections similar to our section 36 of article 4 of the Missouri Constitution. The courts were liberal in construing the emergency provision of such sections. They largely ruled that when the lawmaking body said that an emergency existed the matter was foreclosed. It was simply a matter of the time at which the law became effective, and had no real substance. And since the referendum provisions of state constitutions some courts, viewing the 'peace and safety' clause of these constitutional provisions in the light of mere emergency clauses of a law, have ruled that, if the lawmaking body declared that the measure was for the 'immediate preservation of the peace, health or safety,' such legislative declaration was binding upon the courts and a finality. To the rule in this line of cases we do not agree. The very substance of a constitutional right could be taken from the people by an overanxious and hostile legislative body. The right here involved is not only constitutional, but one of vital importance and of large proportions. If the courts cannot view the whole measure, and from it determine whether or no the lawmakers overstepped the constitutional restrictions in denying the referendum of the measure by their ukase on the subject of 'immediate preservation of peace, health or safety' then the constitutional referendums become a farce. It becomes a legislative referen-

dum, rather than a constitutional referendum, because by a mere false declaration as to 'the peace, health or safety' every measure could be precluded from the constitutional referendum."

Later, in the foregoing opinion, the court said:

"The reason of the thing lies with this rule. By the referendum provision of our Constitution, as we have construed it, supra, no measure subject to the referendum can be withdrawn therefrom by a mere emergency clause. Nor should the people be denied their constitutional right of referendum by a mere declaration of 'immediate preservation of the peace, health or safety' unless such declaration is borne out by the face of the measure itself. The courts have the right to measure the law by the yardstick of the Constitution, and determine whether or not the lawmakers breached the Constitution in making the declaration."

After discussing cases from other states on the same question, the court further said in the Sullivan case (224 S.W. 1. c. 339):

"So that in the case at bar, had the lawmakers in section 81 of the measure actually declared such measure to be necessary for the 'immediate preservation of the peace, health or safety,' we would hold such section void upon a comparison of the measure as a whole with the constitutional provisions of section 57 of article 4 of the Constitution. The words 'necessary for the immediate preservation,' as found in our Constitution, must be given effect, and are of vital importance in measuring the legislative act by the Constitution. Many acts may be necessary to public peace, health, and safety, yet not be

'necessary for the immediate preservation of the public health, peace or safety.'"

The above case has been consistently followed by the Supreme Court of Missouri. In the later case of State ex rel. v. Becker, 289 Mo. 660, 233 S.W. 641, the decision in the Sullivan case was attacked for several reasons, but the Court expressly approved the holding of the Sullivan case on the question of the validity of an emergency clause in a legislative act and of the power of the Court to question such validity. The principal opinion in the Becker case said:

"There is but a single legal proposition presented by this record to this court for determination, and that is, Has the Legislature of the state the constitutional authority under section 57, art. 4, of the Constitution, to enact a law, and debar the power of the courts of the state from passing upon the question as to whether or not the law is subject to referendum by adding thereto the words, 'This enactment is hereby declared necessary for the immediate preservation of the public peace, health, and safety, within the meaning of section 57 of article 4 of the Constitution of Missouri'? * * * * This question has been most elaborately and ably discussed by counsel for the respective parties, and all the authorities bearing upon the question from the various states of the Union have been cited; and, after a thorough consideration of the same, I am fully satisfied that the law of the case was, and is, fully and correctly declared by Judge Graves in the case of State ex rel v. Sullivan, 224 S.W. 327, where the same legal proposition was presented to this court for determination that is here presented by this case. I fully concurred in the views as there expressed by Judge Graves, and adopt them as my views of the law of this case."

The Sullivan case was also cited with approval on the same question in State ex rel. v. Maitland, 296 Mo. 338, 246 S.W. 267, and Fahey v. Hackmann, 291 Mo. 351, 237 S.W. 752. Also, in the case of State ex rel. v. Linville, 318 Mo. 698, 300 S.W. 1066, the Court, at l. c. 1068, said:

"It was held in the case of State v. Sullivan, 283 Mo. 546, 224 S.W. 327, that these two sections of the Constitution must be construed together; that a declaration in a bill that it was an emergency measure within the meaning of the Constitution, did not make it so; that the emergency must appear in fact upon the face of the bill to be within the terms of the Constitution, authorizing an emergency clause which would put the act into immediate effect."

From the above we think it is clear that even though a legislative act declares that an emergency exists and that the act is "necessary for the immediate preservation of the public peace, health or safety," the Courts are not bound by such declaration, but may and should look at the whole act to determine whether in fact such an emergency is set forth in the act as will authorize the legislature to cause the act to become effective sooner than ninety days after the adjournment of the legislature. With this principle in mind, we turn to the various acts under consideration to see if they are such as justify emergency clauses, putting them into effect immediately upon passage and approval.

S. B. 85 is an act to repeal Section 9277, R. S. Mo. 1939, relating to qualifications and compensation of the Superintendent of Missouri State Sanatorium at Mount Vernon, and to enact a new section in lieu thereof relating to the same subject matter. Said Section 9277 read as follows:

"The superintendent of the Missouri state sanitorium, at Mount Vernon, shall be a physician skilled in the treatment of tubercular diseases, and shall receive for his services the sum of \$3,600.00 per annum, payable

monthly, together with all necessary and actual traveling expenses."

The new section (same number) of S. B. 85 reads as follows:

"The superintendent of the Missouri State Sanatorium, at Mount Vernon, shall be a physician skilled in the treatment of tubercular diseases, and shall receive for his services the sum of not less than \$4,000.00 nor more than \$6,000.00 per annum, payable in monthly installments, said annual compensation to be determined by recommendation of the president of the board and approval by the board of managers, together with all necessary and actual traveling expenses."

Comparison of the new section with the one to be repealed, shows that no change whatever was made in the provisions as to the qualifications of the superintendent referred to in said sections, and that the only provisions changed were those relating to the compensation of such officer. The old section provided that said officer should receive for his services the sum of \$3,600.00 per annum, together with all necessary and actual traveling expenses, while the new section provides that the officer shall receive for his services the sum of not less than \$4,000.00 nor more than \$6,000.00 per annum, the amount to be determined by recommendation of the president of the board and approval by the board of managers, together with all necessary and actual traveling expenses. The new act, therefore, changes the amount of the superintendent's salary and provides a different method for determining the exact amount of the salary.

Section 2 of S. B. 85 reads as follows:

"Since the present compensation for physicians at eleemosynary institutions is totally inadequate and the emergencies of the war render this situation extremely acute, it, therefore, becomes necessary to relieve

the situation as speedily as possible, and this Act is necessary for the immediate preservation of the public health, safety, and general welfare, and an emergency, therefore exists within the meaning of the Constitution, and this Act shall be in full force and effect for and after its passage and approval."

The facts constituting an emergency are thus declared to be the gross inadequacy of the compensation of physicians at the eleemosynary institutions and the further fact that the emergencies of the war render that situation extremely acute. In other words, the plain meaning of the language used in the emergency clause is, that in view of the increased cost of living caused by the war, the compensation of physicians at eleemosynary institutions of the state are totally inadequate and, that the situation should be relieved immediately. There is nothing in the act to indicate that physicians cannot be obtained at these institutions at the compensation now provided. The only fact stated as creating an emergency is the fact that the compensation of these particular persons is totally inadequate under present conditions. The same argument could probably be made as to the compensation of many state officers and employees, but does that fact constitute an emergency, that is, a situation which is a threat to the "immediate preservation of the public health, peace or safety"?

The case of State ex rel. Harvey v. Linville, 318 Mo. 698, 300 S.W. 1066, involved an act which had been passed increasing the salary of the county superintendent of schools. The act contained the following emergency clause:

"Sec. 4. Emergency Clause. The fact that the annual school election will be held on the first Tuesday in April, 1919, at which time county superintendents of public schools for the several counties in this state will be elected, creates an emergency within the meaning of the Constitution; therefore, this act shall take effect and be in force from and after its passage."

In passing upon the validity of the emergency clause in the foregoing case, the court said:

"Plainly the emergency clause in the act does not state a condition to which the emergency provision of the Constitution could apply."

The Linville case was followed in the later case of Hollowell v. Schuyler County, 322 Mo. 1230, 18 S.W. (2d) 498.

From all the above we must conclude that mere inadequacies of compensation of public officials, or employees, is not a situation which requires that it be corrected "for the immediate preservation of the public health, peace or safety." Therefore, the emergency in S. B. 85 (Sec. 2) is invalid and of no effect.

S. B. 86 is an act designed to repeal Section 9278, R. S. Mo. 1939, relating to eleemosynary institutions and the authority of the superintendent of the several eleemosynary institutions to control and manage them and the superintendent's compensation, and to enact a new section in lieu thereof. Said Section 9278 read as follows:

"The person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution with special attention to the health and sanitation of the respective institution over which he has been appointed as manager, and shall devote his entire time thereto, and shall receive, unless otherwise provided for, the sum of \$3,600.00 per annum, to be paid monthly, together with all necessary and actual traveling expenses. The superintendent of the Missouri state school shall receive the sum of \$3,600.00 per annum, to be paid in monthly installments, together with all necessary and actual traveling expenses."

The new section enacted by S. B. 86, (same number), reads as follows:

"The person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution with special attention to the health and sanitation of the respective institutions over which he has been appointed as manager, and shall devote his entire time thereto, and shall receive as compensation for his services, unless otherwise provided for, not less than the sum of \$4,000.00 nor more than the sum of \$6,000.00 per annum, to be paid in monthly installments, said annual compensation to be determined by recommendation of the president of the board and approval by the board of managers, and in addition thereto he shall receive all necessary and actual traveling expenses. The Superintendent of the Missouri State School shall receive not less than the sum of \$4,000.00 nor more than the sum of \$6,000.00 per annum, to be paid in monthly installments, said annual compensation to be determined by recommendation of the president of the board and approval by the board of managers, and in addition thereto he shall receive all necessary and actual traveling expenses."

A comparison of the old section with the new section will show that there is no change whatever made in the new section, with respect to the powers and duties of the superintendent of the eleemosynary institutions, and that the only change that is made by the new act is a change in the amount of the compensation of such officer. The situation with respect to S. B. 86 is, therefore, identical with that set forth in S. B. 85, which was discussed above. The emergency clause of S. B. 86 is likewise identical with the emergency clause of S. B. 85. It is, therefore, apparent that the emergency clause in S. B. 86 is of no more force and effect than the emergency clause

of S. B. 85, which we discussed above, and therefore we must conclude that the emergency clause of S. B. 86 is likewise invalid.

S. B. 87 is an act designed to repeal Section 9280, R. S. Mo. 1939, relating to eleemosynary institutions and the authority of the board of managers to appoint assistant physicians -- number and compensation, and to enact a new section in lieu thereof. Said Section 9280 read as follows:

"The state eleemosynary board, upon the joint recommendations of the president of the board and the superintendent of each institution concerned, shall appoint assistant physicians for the various eleemosynary institutions of the state on the following basis, to wit: * * * * *

The new section in S. B. 87 reads identical with the old one above quoted, except that the words "staff physicians" are used instead of "assistant physicians." Following the colon in each statute, brackets are set up to determine the number of assistant or staff physicians which may be used, and providing for the compensation of the various classes of physicians. The ultimate effect of the new act, therefore, is to provide more physicians for the eleemosynary institutions and to provide for greater compensation. The emergency clause in S. B. 87 is identical with the emergency clauses of S. B. 85 and S. B. 86, discussed above. It might be that had the emergency clause in S. B. 87 recited that the number of physicians now provided by law was insufficient to properly take care of the patients at the various institutions, and that therefore there was an imperative need for correcting this situation, it might be said that an emergency was stated in the bill. However, the emergency clause only recites that the emergency is the inadequacy of the compensation of the physicians. Apparently the Legislature did not consider that the need for additional physicians was sufficient to create an emergency. It only considered that the inadequacy of the pay of the present physicians was the real emergency. From what was said above with regard to S. B. 85 and S. B. 86, we conclude, therefore, that the emergency clause in S. B. 87 is likewise invalid and of no effect.

So far as the emergency clauses in the three bills under discussion are concerned, therefore, the three bills will go into effect ninety days after the adjournment of the present session of the 63rd General Assembly. However, in order to answer your question completely, the real object of which is to determine when you shall commence issuing warrants in accordance with said three acts, it is necessary that we direct attention to another provision of the Constitution. Section 13 of Art. VII reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

It is held that a provision like the above applies only to officers having a fixed term. In 46 C. J. 1023, it is said:

"A constitutional prohibition against changing the compensation of an officer during his term applies only to officers having a fixed and definite term."

Also, in the case of State ex rel. v. Farmer, 271 Mo. 306, 196 S.W.1106, 1109, we find the following:

"The constitutional provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a term by statute only, and in no wise refers to the individual who may incidentally happen to be the incumbent for more than one term."

Also, in the case of State ex rel. v. Johnson, 123 Mo. 43, it was held that a city officer appointed by the council and subject to removal by it at pleasure is not an officer within the meaning of the Constitution prohibiting the increase of the salary of an officer during his term.

If, therefore, the persons occupying the positions set forth in the acts, at the time said acts become effective, are state officers with fixed terms, then such in-

creases in compensation cannot be effective as to them.

By Section 9259, R. S. Mo. 1939, the state eleemosynary institutions are placed under the care, management, and control of a board of managers. Section 9275, R. S. Mo. 1939 reads as follows:

"The board of managers shall appoint some suitable person as superintendent for each of the several eleemosynary institutions herein named."

No term is fixed by the fore going section for the various superintendents. Furthermore, Section 9281, R. S. Mo. 1939 provides as follows:

"The superintendent of the several state institutions herein enumerated may be removed by the board for cause or upon the recommendation of the health supervisor, and the several assistant physicians may be removed at any time by the superintendent of such institution and any assistant physician shall be removed by the superintendent upon the recommendation of the health supervisor."

In 46 C. J. page 964, it is said:

"Where the term of office is not fixed by law, the officer is regarded as holding at the will of the appointing power, even though the appointing power attempts to fix a definite term; and an officer removable at the pleasure of the appointing power has, in the strict meaning of the word, no 'term' of office."

It will be seen, therefore, that the superintendents of eleemosynary institutions are not appointed for any definite term and that they are subject to removal in accordance with Section 9281, supra. So, whether the superintendents are officers or merely employees, the provisions of Section 13, Art. VII of the Constitution,

supra, do not apply to them. The compensation of such superintendents can, therefore, be increased while they are serving and, the provisions of S. B. 85 and S. B. 86 will be effective as to the various superintendents at the time said acts go into effect.

S. B. 87 relates to the compensation of staff physicians for the various eleemosynary institutions of the state. No term of office or employment is prescribed for them. On the contrary, Section 9281, supra, provides that such physicians may be removed at any time by the superintendent of such institution and shall be removed by the superintendent upon the recommendation of the health supervisor. So, whether said staff physicians are officers or employees makes no difference so far as the provisions of Section 13, Art. VII of the Constitution, supra, are concerned. If they are officers they have no term and, if they are not officers they are employees, in either of which event the constitutional provision does not apply.

CONCLUSION

It is, therefore, the opinion of this office (1) that the emergency clauses in Senate Bills 85, 86 and 87 of the 63rd General Assembly are invalid and of no effect, (2) that said acts will go into effect ninety days after the final adjournment of the present session of the 63rd General Assembly, and (3) that when said acts go into effect they will be effective to increase the compensation of the superintendents and physicians mentioned therein who are serving at that time.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

HHK:CP

CRIMINAL COSTS: Costs accrued after remand of convict by the Circuit Court of Cole County to the county in which criminal charges are pending against him.

December 11, 1945

FILED

83

17/20

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This department is in receipt of your request for an opinion, based on the following facts:

"This Department desires an opinion from your Office with respect to payment of criminal costs as set out in Cost Bill hereto attached.

"For your information and convenience we also attach a copy of the Information and copy of the Sheriff's amended Return on the Writ."

(Note: The items of cost and the information contained on the Cost Bill are copied on a separate sheet and attached hereto.)

The payment of costs in criminal cases by the State, in the event the defendant is acquitted, is based on Section 4223, R. S. Mo. 1939, which provides in part:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; * * * *"

The defendant was charged in the Circuit Court of Cape Girardeau County with the crime of grand larceny in connection with the stealing of hogs, for which the penalty, as set by

Section 4457, R. S. Mo. 1939, is "imprisonment in the penitentiary not exceeding seven years," which brings this cost bill generally under Section 4223, supra.

The fees charged by officers of Cape Girardeau County are fees enumerated and authorized by statute as costs in criminal cases. These charges were incidental to and accrued by action taken on a criminal charge pending against the defendant in Cape Girardeau County by officers of said county.

Section 13409, R. S. Mo. 1939, provides that clerks of Criminal Courts shall be allowed, among other fees, the following:

| | |
|--|--------|
| "For entering any judgment or <u>nolle prosequi</u> | \$.50 |
| For a copy of a bill of costs in each case, and certificate of the judge and prosecuting attorney, including certificate and seal . . . | .50 |
| For every order in a case not herein provided for | .15 |
| For filing any paper in a cause . . | .05 |
| For copying bill of costs, after allowance, including certificate and seal, for every hundred words . | .10" |

Section 13413, R. S. Mo. 1939, provides that sheriffs shall be allowed in criminal cases, among other fees, the sum of \$1.00 for committing any person to jail.

Section 13416, R. S. Mo. 1939, authorizes the charge of 75¢ per day for board of prisoners, and is as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

The fees charged by officers of Cape Girardeau County conform with the sections of the statutes quoted.

In considering the legality of the fees accrued and charged in favor of Dave C. Jobe, Sheriff of Cole County, for keeping and returning the prisoner to Cape Girardeau County after he had been ordered returned by a judgment of the Circuit Court of Cole County, your attention is called to Section 13413, R. S. Mo. 1939, which reads in part:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows: * * * * * The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, * * * * * for transporting, safe-keeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and five cents per mile for every mile necessarily traveled in going to and returning from one county to another, and the guard employed, who shall in no event exceed the number allowed the sheriff, marshal or other officer in transporting convicts to the penitentiary, shall be allowed the same compensation as the officer. One dollar and twenty-five cents per day, mileage same as officers, shall be allowed for board and all other expenses of each prisoner. * * * * *"

You will note the above section authorizes these fees for the removal from one county to another for any cause authorized by law. The removal of this prisoner was authorized by Section 1632, R. S. Mo. 1939, which deals with the custody of a prisoner after he is ordered remanded in a habeas corpus proceeding to the county in which criminal charges are pending against him. This section provides:

"If a prisoner be not entitled to his discharge, and be not bailed, the court or magistrate before whom the proceedings are had shall remand him to the custody or place him under the restraint from which he was taken, if the person under whose custody or restraint he was be entitled thereto; if not so entitled, then he shall be committed to the custody of such officer or person as by law is entitled thereto."

In the case of State ex rel. Gentry, Atty. Gen., et al. v. Westhues, Judge, et al., 286 S.W. 398, l.o. 399, 315 Mo. 672, in ruling upon the question of a remand where the pleadings showed on their face that the prisoner was charged with the crime in another county, the court said:

"From the applicant's pleaded admission, therefore, regardless of what evidence may have been adduced at the habeas corpus hearing, he had been charged with and entered a plea of guilty to a crime punishable by imprisonment in the state penitentiary. His parole, its revocation, and his rearrest all presuppose a judgment and sentence; but if such was not rendered, as he contended, and as the Cole county circuit court evidently found, he was still not entitled to go at large, but should have been committed to the sheriff of Pulaski county for the judgment and sentence of the Pulaski county circuit court. Such a situation is expressly provided for by our habeas corpus act * * * * *

"Although the Cole county circuit court had jurisdiction to determine upon the merits of the evidence, either rightly or erroneously, that the acting warden of the state penitentiary was not entitled to detain Overby, yet upon the face of the record the sheriff of Pulaski county was entitled to detain him until he could receive judgment and sentence from the circuit court of that

county. The circuit court of Cole County proceeded without jurisdiction in ordering the absolute discharge of Ezra Overby, and its judgment rendered therein is quashed."

In the case of LaGore v. Ramsey, 126 S.W. (2d) 1153, 1.c. 1156, in a habeas corpus proceeding filed directly in the Supreme Court that court said:

"It is therefore considered, ordered and adjudged by the court that the petitioner, Donald Orville LaGore, by which name he was indicted and convicted, be released from his imprisonment in the state penitentiary and delivered to the marshal of this court; that said marshal be and is hereby ordered to deliver said petitioner to the sheriff of Jackson County, Missouri, who shall present him to the court of said county having jurisdiction in felony cases; and that said court be and is hereby ordered to sentence said petitioner to imprisonment in the state penitentiary, on the charge of which he was convicted, for a term of fifteen years from and after April 20, 1937, the date of his conviction."

It will be noted further that Section 13413, supra, provides that "the sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed" is entitled to charge the fees provided therefor. We cannot find a case directly in point, but the taking charge of the prisoner by the sheriff after the order of remand by the Circuit Court of Cole County could logically be said to be a constructive apprehension of a person, charged with a criminal offense, by legal process; the order of the Circuit Court being the legal process.

The court, defining the word "apprehension," said in the case of Cummings v. Clinton County, 181 Mo. 162, 1.c. 171, 79 S.W. 1127:

"It is true that the words used in the statute are 'apprehension and arrest,' while in the reward paper, the word 'apprehension' alone is used, but their meaning is substantially the same

and it is generally so understood.

"One of the definitions of 'apprehension' given in Webster's International Dictionary is: 'to take or seize (a person) by legal process; to arrest; as, to apprehend a criminal.' Arrest is defined in the same work as, 'The taking or apprehending of a person by authority of law; legal restraint; custody.' It will be seen that the one is comprehensive of the other."

More nearly in point is a California case, *People v. Martin*, 205 P. 121, 123, 188 Calif. 281. In this case the defendant had been arrested in one county and taken to another county where he was in jail awaiting extradition to another state for embezzlement, and while in the jail was charged in that county with bigamy. The California penal code fixes venue for the trial of bigamy cases in either the county of apprehension or in the county where the offense was committed. The defendant challenged the venue and contended that he was not apprehended in the county in which he was charged. The court held that he was apprehended on the bigamy charge in the county in which he was in jail awaiting extradition when the charge was filed.

Considering the facts of the case, upon which you base your request for an opinion, there seems to be no doubt that the removal of this prisoner to the county in which he was charged with the criminal offense would be authorized by either or both of the provisions of Section 13413, *supra*, as being a removal "for any cause authorized by law," or under "The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed."

The amounts of the fees charged by the sheriff of Cole County, as shown on the Cost Bill, do not conform with the statute or with the return made by the sheriff after he had delivered the prisoner to Cape Girardeau County. These items should be corrected to conform with Section 13413, *supra*.

Conclusion.

It is the opinion of this department that the fees

Honorable Forrest Smith

-7-

enumerated in this Cost Bill should be paid after the amounts of the fees charged by Dave C. Jobe, Sheriff of Cole County, have been corrected to comply with Section 13413, supra.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml
Enc.

OFFICERS: May recover money expended for necessary extra clerk hire.

October 3, 1945

FILED

84

Honorable George A. Spencer
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, which is as follows:

"Mr. Maurice Dysart, our County Treasurer, has called at my office and discussed the problem of being reimbursed for clerical hire that he has been out to assist him in the office. Two questions are involved, one of which you have perhaps ruled on but I would like to have a specific ruling as to whether or not he is entitled to reimbursement; and the second, how far back could he now go in determining the amount to which he is entitled, if your answer to the first question is that he is entitled to reimbursement.

"To give you all the facts in this particular case, the Treasurer has not budgeted in the past for this item of expense. Would it be necessary to wait and put an item in the budget at the beginning of next year to cover this expense of the past as well as the expense for the year 1946 and if he is entitled to be paid now or budget for it beginning 1946 how far back, in your opinion, would he be entitled to go?"

October 3, 1945

It was the settled law of this state for many years that no officer was entitled to compensation from public funds unless he was able to point to a law authorizing the payment. In State ex rel. Buder v. Hackmann, 265 S. W. 532, the Assessor of the City of St. Louis attempted to collect additional compensation for the payment of clerks and deputies which were necessary to the performance of his duties. To support his claim, he relied on Section 13116, R. S. Mo. 1919, which provided in part (referring to the assessor):

" * * * and he and his deputies shall be entitled to receive their actual necessary expenses incurred in the performance of their duties; * * * "

There was no question in the case as to the necessity of the employment of the extra clerks for which compensation was sought, and the Supreme Court, in denying the claim, stated, l. c. 534-535:

"Before the state can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer claiming such fee or expense must be able to point out the law authorizing such payment. Williams v. Chariton County, 85 Mo. 645; State ex rel. Wilder, 197 Mo. loc. cit. 32, 94 S. W. 499; Sanderson v. Pike Co., 195 Mo. loc. cit. 605, 93 S. W. 942. * * *

"The argument of hardship, and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his office, cannot be considered by the courts in passing upon the rights of relator, as fixed by the statute. Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty. State ex rel. v. Brown, 146 Mo. loc. cit. 406, 47 S. W. 504. It may be that an assessor actually sustains a financial loss in the performance of his duties under our state Income Tax Law.

But such fact is for consideration by the Legislature and not by the courts. In view of what we regard as the plain provision of the statute that clerk or deputy hire shall be paid by the assessor out of the fees received by him, the cases of *Ewing v. Vernon Co.*, 216 Mo. 681, 116 S.W. 518, and *Harkreader v. Vernon Co.*, 216 Mo. 696, 116 S. W. 523, cited and relied upon by relator, need not be discussed."

However, in the more recent case of *Rinehart v. Howell County*, 153 S. W. (2d) 381, a contrary view was taken. In that case the prosecuting attorney hired a stenographer, at his own expense, and claimed reimbursement from the county on the theory that the stenographic services rendered were necessary in the discharge of his duties. While the court stated that the case was to be distinguished from those in which officials were denied compensation not authorized by law, the distinction appears to be based on the requirement that the officer claiming the compensation must have already paid out money for expense in connection with his duties. In upholding the judgment of the prosecuting attorney against the county for the salary of his stenographer, the court stated, l. c. 382-383:

" * * * The instant case was submitted on the theory, as disclosed by the stipulated facts and undisputed testimony, that the outlays, as contradistinguished from income, were bona fide, reasonable and actual expenditures for indispensable expenses of the office by respondent (not on the theory that compensation to an officer was involved) and falls within the ruling in *Ewing v. Vernon County*, 216 Mo. 681, 695, 116 S. W. 518, 522(b). That case quoted with approval a passage from 23 Am. and Eng. Ency. Law, 2d Ed., 388, to the effect that prohibitions against increasing the compensation of officers do not apply to expenses for fuel, clerk hire, stationery, lights and other office accessories and held a recorder entitled to re-

October 3, 1945

imbursement for outlays for necessary janitor service and stamps, stating: 'Fees are income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo.'"

Following the decision in this case, it would appear that if the expenses incurred by the county treasurer of Boone County in employing extra clerks were necessary to the proper conduct of the office, then said county treasurer is entitled to reimbursement for such expenses by the county.

In considering your second question as to the action that should be taken by the county treasurer with regard to the county budget law, your attention is invited to Section 10912, R. S. Mo. 1939, which reads in part:

"It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year * * *."

Under the mandate of this statute, the treasurer should budget for 1946 the expenses which he expects to pay out during that year for necessary expenses of his office for personal service.

With regard to your question as to how far back the claimant may recover for necessary outlays in conducting his office, it is believed that a proper answer is to be found in Gill v. Buchanan County, 142 S. W. (2d) 865. In that case only partial payment had been made of the salary of a county judge for prior years, and it was sought to deny his claim

October 3, 1945

for such back salary on the ground that there was not a sufficient amount provided in the county budget for the payment of such claim. In overruling the contention of the defendant county that plaintiff could not recover because he failed to demand payment during the prior years, the court stated, l. c. 669:

"Third: Failure to make a prompt claim cannot mislead a county to its detriment as it might in the case of an individual or private corporation, because a county can only be compelled to make payment out of tax revenue when there is a surplus in any year after all necessary charges have been met, or by a levy when it is not necessary to levy the full amount authorized by constitutional limitations to meet essential expenses, or, if it cannot thus create a surplus or raise funds by levy, to pay otherwise when a bond issue is authorized by the required majority of its citizens, willing to approve it by their votes. * * * In short, even judgments for valid obligations cannot curtail future essential governmental activities."

In view of these cases, it appears that the officer in question could recover necessary expenditures paid out in past years for the period not barred by the statute of limitations. However, we wish to invite attention to a further holding in the Gill case, supra, which has a very direct bearing on the manner in which claims such as those sought in your opinion request may be paid. The court further limited the mode of payment in that case by the following language, l. c. 669:

"Plaintiff, therefore, as the result of the failure to make an earlier claim, has placed himself in a position where, even if he obtains judgment, he can only collect it under one of the above stated situations. * * * "

October 3, 1945

CONCLUSION

It is our conclusion that a public officer who has expended money for reasonable and necessary expenses in the conduct of his office may recover for such outlay from public funds for such period as the county court may fail to interpose the statute of limitations as a defense. Any officer seeking to recover such expenses should place the estimated expense of such nature in his budget for each year, but failure to include such item is not a bar to recovery. Payment for claims for prior years must be met from surplus funds after all expenses for the current year have been met, or by bond issue or levy, if constitutional limitations permit, if such a surplus does not exist.

Respectfully submitted,

ROBERT I. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR -

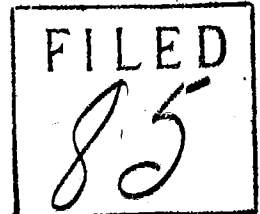
BOARD OF HEALTH:

Soliciting patronage by agents does
not include advertising.

REVOCATION OF LICENSE:

January 25, 1945

Dr. James Stewart, Secretary
State Board of Health of Missouri
Jefferson City, Missouri



Dear Sir:

We have for answer your opinion request of January
16, 1945, which is as follows:

"I hereby request your opinion upon the
following question: Does advertising by
a physician in newspapers or magazines,
or by the distribution of handbills or
other advertising matters constitute
'Soliciting Patronage by Agents' as set
out in Section 9990, Revised Statutes of
Missouri, 1939, and would the State Board
of Health have authority to institute pro-
ceedings looking to the revocation of such
physicians licenses under this portion of
Section 9990."

Section 9990, R. S. Mo. 1939, provides:

"The board may refuse to license individuals
of bad moral character, or persons guilty of
unprofessional or dishonorable conduct, and
they may revoke licenses, or other rights to
practice, however derived, for like causes,
and in cases where the license has been
granted upon false and fraudulent statements,
after giving the accused an opportunity to
be heard in his defense before the board as
hereinafter provided. Habitual drunkenness,
drug habit or excessive use of narcotics, or
producing criminal abortion, or soliciting

patronage by agents, shall be deemed unprofessional and dishonorable conduct within the meaning of this section. * * *

Webster's New International Dictionary, Second Edition, Unabridged, sets forth the several meanings of the words "advertise" and "solicit" and the meaning of the word "advertise" which applies here is as follows:

"To give notice or information; specif., to issue statements, requests, etc., usually in print, to inform or interest the public."

The meaning of the word "solicit" which is most applicable here is as follows:

"To make petition to; to entreat; importune; as, to solicit the king for relief; now, often, to approach with a request or plea, as in selling, begging, etc.; as to solicit one's neighbors for contributions."

In the case of In Re Owen, a North Carolina case, 177 S. E. 403, a dentist was charged (1) by himself and by another with soliciting professional business as a practitioner of dentistry by running paid advertisements, and/or solicitation for professional business in the Asheville Citizen; and that (2) by himself, or another, soliciting professional business by advertisements upon the buildings in the City of Asheville in which city the said dentist had his offices, said signs or advertisements soliciting professional business all being painted in yellow and black colors, and of large dimensions.

The North Carolina statute provided:

"Whenever it shall appear to the North Carolina state board of dental examiners that any licensed dentist practicing in the State has been guilty * * * of false

notice, advertisement, publication, or circulation of false claims, or fraudulent misleading statements of his art, skill, or knowledge, or of his methods of treatment or practice, * * * or has by himself or another solicited professional business the board shall revoke the license of such person."

The North Carolina court held:

"Advertising or the circulation of statements, without the taint of falsity or fraud, either by newspaper or sign, although paid for, cannot be construed as a violation of the statute. Advertising and soliciting are not synonymous terms. If such were so, every dentist who inserted a professional card in a registry, directory, or other publication, and paid for such insertion, or who placed upon the window or door of his office, or upon the wall of the building in which his office is located, his name, followed by the word 'dentist,' would subject himself to an accusation that might lead to the revocation of his license. * * * * *

The court said further:

"We do not pass upon the ethics of the advertising resorted to by the respondent in this case, but, under the statute as drawn, in the absence of any allegation of falsity or fraud, we are constrained to hold that judgment below is erroneous. If the North Carolina board of dental examiners desire to have further limited the nature and extent of advertising to which members of their profession may lawfully resort, their remedy lies with the Legislature and not

Dr. James Stewart

-4-

Jan. 25, 1945

the courts. The lawmaking branch of the government, if in its wisdom it saw fit, might make unlawful any kind of advertising by members of the dental profession, whether false or otherwise, but as yet it has not done so."

CONCLUSION

It is, therefore, the opinion of this Department that inasmuch as the word "soliciting" as used in the statute is not synonymous with "advertising" the phrase "soliciting patronage by agents" would not cover advertising by a physician in newspapers or magazines, or by the distribution of handbills, or other advertising matters.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

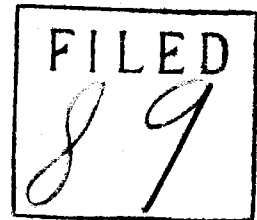
APPROVED:

HARRY H. KAY
(Acting) Attorney General

AVO:CP

CONSTITUTION: Applicability of Sec. 11, Art. X, Constitution of 1945, with respect to maximum levies which may be made by cities of less than 10,000 population for the year 1945.

May 3, 1945



Honorable D. D. Thomas, Jr.
Prosecuting Attorney
Carrollton, Missouri

Dear Sir:

Reference is made to your letter under date of April 28, 1945, requesting an official opinion of this office, and reading as follows:

"The officials of several towns in Carroll County have asked that I request your office to issue an opinion on the proposition of whether or not such towns can now levy a tax of not to exceed \$1.00 on the \$100.00 valuation, as provided in Section 11 of Article X of the Constitution of Missouri, of 1945, or whether they must wait until legislation is enacted.

"These towns will all be preparing their tax schedules within the next few days. If it is possible for you to forward me an opinion by May 3rd, it will be greatly appreciated."

In connection with the consideration of the question you have proposed, we have taken note of the fact that Carroll County, Missouri, does not include within its boundaries a city larger in population than ten thousand.

It is provided by Article X, Section 11, of the Constitution of 1945 that municipalities will be permitted to adopt levies not greater than one dollar on the one hundred dollars assessed valuation. We quote the applicable portions of the Constitution of 1945:

May 3, 1945

"Section 11. Taxes may be levied by counties and other political subdivisions on all property subject to their taxing power, * * *.

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

"For municipalities--one dollar on the hundred dollars assessed valuation;
* * * "

The maximum levy for cities of the fourth class is presently fixed by Section 7098, R. S. Mo. 1939, from which we quote, in part:

* * * * If such report shows that the city has less than 10,000 inhabitants, the city council may levy on all subjects and objects of taxation for city purposes not to exceed fifty cents on the one hundred dollars valuation. Should the population be one thousand or less, said rate of levy shall not exceed twenty-five cents on the one hundred dollars valuation. The foregoing are maximum rates which may be levied in said cities and towns: * * * "

The maximum levies which may be made by towns and villages are presently fixed by the provisions of Section 7259, R. S. Mo. 1939, from which we quote, in part:

" * * * and it shall be the duty of such board of trustees to establish by ordinance the annual rate of tax levy for the year, which shall not be in excess of twenty-five cents on the one hundred dollars valuation. The foregoing is the maximum rate any board of trustees shall have power to levy: * * * "

May 3, 1945

From consideration of the above quoted portions of the statutes, it is apparent that there now exists statutory limitations upon the maximum levies which may be made by cities, towns and villages in Carroll County, Missouri; and that such statutory limitations are inconsistent with the above quoted portion of the Constitution of 1945. In view of the fact that such statutory limitations do exist, we deem it pertinent to direct your attention to Section 2 of the Schedule appended to the Constitution of 1945, from which we quote, in part:

" * * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

By the express provisions of Section 2 of the Schedule appended to the Constitution of 1945, it is apparent that the present statutes fixing the maximum levies which may be made by municipalities such as are found in Carroll County, Missouri, will remain in full force and effect until July 1, 1946.

CONCLUSION

In the premises, we are of the opinion that in fixing the levies for the year 1945, the respective city councils and boards of trustees of the municipalities located in Carroll County, Missouri, must comply with the limitations imposed by such portions of Sections 7098 and 7259, R. S. Mo. 1939, as are applicable, and that Article X, Section 11, of the Constitution of 1945 will not apply to such levies so made in 1945.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

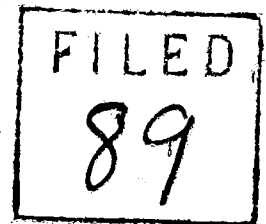
J. E. TAYLOR
Attorney General

WFB:HR

CONSOLIDATED SCHOOL DISTRICTS: Funds of such district cannot lawfully be used to purchase a residence for the Superintendent of Schools of such district.

July 11, 1945

Honorable D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri



Dear Mr. Thomas:

This will acknowledge receipt of your letter of July 2nd, 1945.

Your letter states:

"I have been requested by members of the Board of the Wakenda Consolidated School District of Wakenda, Missouri, to request your opinion on the question of whether or not such District may purchase real estate for the purpose of providing a residence for its superintendent of schools.

"I have given it as my opinion that the Board has no such authority but the Board desires an official statement from your Office."

Section 10487, R. S. Mo. 1939, outlines the procedure for the formation of a consolidated school district. A consolidated school district is one formed from three or more common school districts or a village school district with two or more adjoining districts. Said section is as follows:

"Three or more common school districts, or a village district having less than two hundred children of school age by last enumeration, together with two or more adjoining districts, may be consolidated into a new district for the purpose of maintaining both primary schools and a high school by proceedings had in accordance with the provisions of section 10410. When such new district is formed it shall be known as 'Consolidated district No.

_____ of _____ county' and shall organize at a special meeting within fifteen days after the formation thereof; such organization and the government of such consolidated district shall be under and in compliance with the laws governing town and city school districts as provided in article 5 of this chapter."

The first paragraph of Section 10474, R. S. Mo. 1939, designating the powers and duties of the board of education of a consolidated school district, is as follows:

"The board of education of any town, city or consolidated school district shall, except as herein provided, perform the same duties and be subject to the same restrictions and liabilities as the boards of other school districts acting under the general school laws of the state: * * * * *

Article 2 of Chapter 72, R. S. Mo. 1939, contains the laws of this state applicable to all classes of schools. This article and chapter prescribe the general methods and measures providing for the collection of taxes for school purposes contained in our statutes. Those methods are set out in the following statutes.

Section 10347, R. S. Mo. 1939, provides for the estimate of funds for a school year. Said section is as follows:

"The board of directors of each district shall, on or before the fifteenth day of May of each year, forward to the county superintendent of schools an estimate of the amount of funds necessary to sustain the schools of their district for the time required by law, or, when a longer term has been ordered by the annual meeting, for the time thus decided upon, together with such other amount for purchasing site, erecting buildings or meeting bonded indebtedness, and interest on same, as may have been legally ordered in such estimate, stating clearly the amount deemed necessary for each fund, and the rate required to raise said amount."

Following the estimate made by the board of education or board of directors of a school district for its annual school requirements, under Section 10395, R. S. Mo. 1939, the county clerk of the county in which such district is located must assess taxes to be collected to make up such fund. That part of said section requiring the county clerk to so proceed is as follows:

"On receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in said district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district of the amount of goods, wares and merchandise owned by them and taxable for state and county purposes: * * * * *

Section 10366, R. S. Mo. 1939, was repealed by the Legislature of 1943 and a new section, numbered 10366, was reenacted, providing for the preservation and distribution of all school moneys, which includes moneys of a consolidated school district such as the Wakenda Consolidated School District of Carroll County, Missouri. Said Section 10366, Laws of 1943, page 893, is as follows:

"All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received. There is hereby created the following funds for the accounting of all school moneys: Teachers' Fund, Incidental Fund, Free Textbook Fund, Building Fund, Sinking Fund, and Interest Fund. School district moneys shall be disbursed only through warrants drawn by order of the board of education. Each warrant shall show the legal identification of the district by name or by number as provided by law; shall specify the amount to be paid; to whom payment is made; from what fund; for what purpose; the date of the board order, and the number of the warrant. Each warrant must be signed by the President and the Secretary or Clerk. No warrant shall be drawn for the payment of any school district

July 11, 1945

indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of said indebtedness.

On page 895, Laws of 1943, as a part of the continuation of said Section 10366, it is provided as follows:

"Money donated to the school district shall be placed to the credit of the fund where it can be expended to meet the purpose for which it was donated and accepted."

It would thus appear from that part of Section 10366 last quoted that if funds were donated for the purchase of real estate for the purpose of providing the superintendent of a consolidated school district with a residence, the board of directors would be authorized to use such donated funds for such purpose. We do not find any statute in this state permitting the board of directors of a consolidated school district, or any other school district, to use the funds of a school district for the purchase of real estate to provide a residence for the superintendent of schools of such district or for any purpose whatsoever other than for the funds as positively directed in said Section 10366, accounting for all school moneys.

Among other precautions taken by the lawmakers of the state for the safety of school funds of a consolidated district we call attention to Section 10503, Article 5, Chapter 72, R. S. Mo. 1939, requiring the selection of a depository for such funds. Said section is as follows:

"The board of education of city, town and consolidated school districts in this state shall select depositories for the funds of such school district in the same manner as is provided by law for the selection of county depositories; and they may loan any moneys held for the payment of outstanding bonds upon the same terms and upon the same conditions as provided by law for loaning county and school moneys."

The statutes of our state and the decisions of our Supreme Court, construing such statutes, hold school funds and all other.

July 11, 1945

public funds to be trust funds in the hands of public officials having the custody, administration, and distribution of said funds in charge.

The strictness with which public officers having custody of public school funds are held to account is briefly, but well stated, by our Supreme Court in the case of Saline County v. Thorp, 88 S. W. (2d) 183, 1. c. 136, where it is said:

"* * * Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but as special trustees with every limited authority, and that every one dealing with them must take notice of those limitations. Montgomery County v. Auchley, 103 Mo. 492, 15 S. W. 626."

In the case of Morrow v. Pike Co., 189 Mo. 610, 1. c. 622, our Supreme Court, stating that school funds are trust funds, and citing the strictness to which officers are held in handling such funds, said:

"* * * It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the lawmaking power in relation to the fund (Ray County to use v. Bentley, 49 Mo., 1. c. 242); It may not divert the general county revenue to its protection, and, on the other hand, it cannot apply the school fund to the payment of ordinary county debts. * * *"

The last cited case, Morrow v. Pike Co., cites the case of Ray County v. Bentley, 49 Mo. 236, on the same question, where, 1. c. 242, our Supreme Court said:

"* * * The County is not the owner of the fund; the title is simply vested in it as trustee, for convenience, to carry out the policy devised by the law-making power for the appropriation and distribution of the fund. In the care, management and control of the fund, the County Court acts purely in an administrative capacity, not as the agent of the county, but in the per-

July 11, 1945

formance of a duty specifically devolved upon it by the laws of the State. There is nothing judicial in the exercise of its functions in this respect. The County Court does not derive its powers from the county, and it can exercise only such powers as the Legislature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. * * * * *

The rules of law announced in the cases above cited, for the preservation and protection of school funds, apply to funds of consolidated school districts.

CONCLUSION

It is, therefore, the opinion of this department that the members of the Board of Directors of the Wakenda Consolidated School District of Wakenda, Missouri, have no authority in law so to do, and may not purchase real estate for the purpose of providing a residence for its Superintendent of Schools.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWG:CP

SCHOOLS: Blind children must attend the Missouri School for the Blind if proper local education is not provided.

FILED

89

October 13, 1945

10/31

Hon. Robert H. The Superintendent
Missouri School for the Blind
3815 Magnolia Avenue
St. Louis 10, Miss

Dear Sir:

We are in receipt of your request for an opinion, dated October 13, 1945, in which you present the following questions:

Can the parents of a blind child of the age of eleven years be compelled to place said child in the proper educational institution, and what officers have the responsibility of seeing that said child is placed in school if his parents fail to comply with the law?

Is there any way in which the attendance officers may be continuously advised of the location of such child?

Section 10587, R. S. Mo. 1939, requires that all children between the ages of seven and fourteen years attend some day school or be provided with home instruction, with the further provision that a child between the ages of fourteen and sixteen years must attend some day school if not engaged in some useful employment. Certain exceptions to the law are enumerated. Section 10587 is as follows:

"Every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and fourteen years shall cause such child to attend regularly some day school, public,

private, parochial or parish, not less than the entire time the school which said child attends is in session, or shall provide such child at home with such regular daily instruction during the usual hours as shall, in the judgment of a court of competent jurisdiction, be substantially equivalent at least to the instruction given the children of like age at said day school in the locality in which said child resides; and every parent or person in this state having charge, control or custody of a child between the ages of fourteen and sixteen years, who is not actually and regularly and lawfully engaged for at least six hours each day in some useful employment or service, shall cause said child to attend regularly some day school as aforesaid: Provided, that a child between the ages aforesaid may be excused temporarily from complying with the provisions of this section, in whole or in part, if it be shown to the satisfaction of the attendance officer, or if he declines to excuse, to the satisfaction of a court of competent jurisdiction, that said child is mentally or physically incapacitated to attend school for the whole period required, or any part thereof, or that said child has completed the common school course as prescribed by constituted authority, or its equivalent, and has received a certificate of graduation therefrom."

Section 10588, R. S. Mo. 1939, applies to physically handicapped children, and is as follows:

"The foregoing section shall apply to feeble-minded, deaf, blind and crippled children where special classes are provided for them as directed in sections 10351, 10352 and 10353, R. S. 1939: Provided, however, that the parent, guardian or other person in this state having charge, control or custody of such feeble-minded, deaf, blind and crippled children for whom special classes are pro-

Hon. Robert H. Thompson - 3

vided, may provide such child at home with such regular daily instruction during the usual hours as shall, in the judgment of a court of competent jurisdiction, be substantially equivalent at least to the instruction given the children of like development in such special classes."

Section 10351, R. S. Mo. 1939, referred to in the above statute, provides for instruction in a special class for groups of ten or more blind, deaf, or crippled children in any school district, with education covering all elementary school grades.

Section 10352, R. S. Mo. 1939, provides that two or more school districts may combine to establish such special classes, but concludes as follows:

" * * * Provided, the pupils cannot be accommodated in the appropriate state institution established. "

It appears that if there are fewer than ten blind or deaf children within any school district, said children must attend the proper state educational institutions, unless they fall within the exceptions set out above in Sections 10587 and 10588.

Article 25, Chapter 72, R. S. Mo. 1939, provides for the establishment of the Missouri School for the Blind at St. Louis and the Missouri School for the Deaf at Fulton. Under Section 10853 of said Article, all blind and deaf persons under twenty-one years of age, of suitable mental and physical capacity, who are residents of this state, may be admitted to the appropriate school. If the resources of any such person, or his parents, are inadequate, then the county court must order such person sent to the proper school at the expense of the county, under Section 10856.

With reference to your inquiry concerning the proper officer to compel attendance of children who are eligible for the Missouri School for the Blind, Section 10589, R. S. Mo. 1939, provides that the county superintendent of schools in each county shall act as school attendance officer for said county, with the specific direction that said officer shall act

in the event a special attendance officer is not provided by the board of education.

Under Section 10590, R. S. Mo. 1939, in counties having more than 200,000 inhabitants and less than 350,000 inhabitants, the county superintendent of schools shall select a school attendance officer for the county.

Section 10594, R. S. Mo. 1939, is the general statute for the enforcement of compulsory school attendance, and is as follows:

"It shall be the duty of the state superintendent of schools, of superintendents of instruction, of boards of education in this state, of the county superintendents of schools, of the county superintendents of public welfare, and of every school attendance and probation officer, to enforce all laws relating to compulsory school attendance."

As to your third question, that of ascertaining continuously the address of any blind child of school age in the state, we know of no way in which that may be done, except that Section 10345, R. S. Mo. 1939, provides for a census of the school children between the ages of six and twenty years, between the thirtieth day of April and the fifteenth day of May of each year. This census is delivered to the county superintendent of schools, and forwarded by him to the county clerk of each county, and the names of blind children of school age must be certified to the superintendent of the School for the Blind in St. Louis. The pertinent part of that section is as follows:

" * * * The County Clerk of each county shall certify * * * to the Superintendent of the School for the Blind in St. Louis the names of blind persons of school age in his county, giving name, age, sex and color, and the name and postoffice address of parent or guardian of such persons. * * * "

Summarizing the above, blind children of the proper school age are subject to the general compulsory school attendance laws,

Hon. Robert H. Thompson - 5

with the usual exceptions for home instruction and physical disabilities.

The state superintendent of schools and the county superintendent of schools, board of education, probation or attendance officer concerned, are charged with the enforcement of the compulsory school attendance laws.

The county clerk of each county must certify to the superintendent of the Missouri School for the Blind at St. Louis the names of blind persons of school age within his county, as furnished him by the county superintendent of schools each year.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

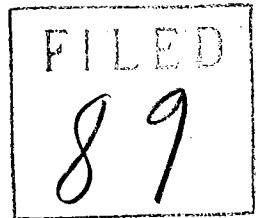
APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

CRIMINAL LAW: Excessively punishing a child, by beating and starving, by persons exercising care and control of the child makes such persons subject to prosecution under Sections 4419 and 4410, R.S. Mo. 1939.

November 17, 1945



11/20

Honorable D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Sir:

Receipt is acknowledged of your letter dated October 4, 1945, in which you requested an official opinion of this office and which reads as follows:

"Assuming there is substantial evidence to the effect that a man and his wife have deliberately starved a boy under seventeen years of age, for the last two and a half years, and have beaten him with a rubber hose, light cord and other implements: I want to know under just what section of the statutes a complaint can be filed.

"Perhaps I should add, these people were not the legal guardians of the child, but that the stepmother left him with the couple to raise.

"It may be that this appears to be a some-what foolish request on my part but I must confess that I am rather confused, after reading the statutes, as to whether or not a complaint can be filed under Section 4419 for the reason that the evidence does not clearly disclose any beating having occurred within the last year. The evidence does indicate that these people have deliberately starved the child and I have no doubt but that a conviction can be obtained,

based on starvation, but there is some question about the sufficiency of proof as to assaults.

"If you have any suggestion to make, with reference to a form of complaint and information, I would be glad to have them."

The main problem in your request is to determine the correct section of the statutes under which the parties indicated in your letter can be charged.

The facts set forth in your letter are that a man and his wife deliberately starved a boy left with them to raise for the last two and one-half years and beat him with a rubber hose, light cord and other implements. However, the evidence does not clearly disclose any beatings having occurred within the last year.

Section 4419, R.S. Mo. 1939, provides as follows:

"If any mother or father of any infant child under the age of sixteen years, whether such child was born in lawful wedlock or not, or any person who has adopted any such infant, or any other person having the care and control of any such infant, shall unlawfully and purposely assault, beat, wound or injure such infant, whereby its life shall be endangered or its person or health shall have been or shall be likely to be injured, the person so offending shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars or by both such fine and imprisonment."

It is our opinion that the persons who assumed the responsibility of raising the child had care and control of the child. Two Missouri cases presenting similar facts to the instant case, where persons were prosecuted for beating a minor child under

their care and control, are State v. Henggeler, 312 Mo. 15, 278 S.W. 743, and State v. Evans, 270 S.W. 684. However, in these cases there was only evidence of beatings, and no evidence of starvation.

It does not appear that the beatings administered in the instant case were for the sole purpose of disciplining the boy. In State v. Koonse, 123 Mo. App. 655, 101 S.W. 139, it was held that severe and excessive punishment of a child by a parent indicated an absence of good faith and was not administered as a disciplinary measure for the child's benefit. In this case the father who made his adopted son run in front of him as he followed on horseback and beat him with a whip was found guilty of unlawful assault.

In the instant case the beating of the boy with a rubber hose, light cord and other implements, we believe, is so excessive as to constitute an unlawful and purposely administered assault or beating and would uphold prosecution for such crime under Section 4419, supra.

In prosecuting the persons entrusted with raising the boy for unlawfully and purposely assaulting or beating him, only the evidence of assaults or beatings when the boy was under sixteen years of age could be used, because Section 4419, supra, only applies when a minor child under the age of sixteen years is assaulted or beaten.

In considering whether starvation alone could uphold prosecution under Section 4419, supra, we must determine whether deliberately starving the boy did unlawfully and purposely injure him, whereby his life was endangered or his health was injured, or was likely to be injured. The word "injure" is defined in Volume 32, C. J., page 512, as follows:

"* * * * It has been variously defined as meaning to cause loss or detriment to; to damage; to damage and lessen the value of; to do harm to; to harm; to hurt; to hurt or wound the person; * * *"

From this definition it is believed that to deliberately starve a person is to injure him by causing him damage or harm to his person. To starve a person can injure or is likely to injure his state of health.

For there to be an injury it is not necessary that there be visible wounds or markings on the body. In defining "injury"

the following quotation is taken from State v. Henggeler, supra, at l.c. 746:

"* * * * 'A wound is an injury to the person by which the skin is broken.' 40 Cyc. 2865. An injury is a broader term. * * *"

In Volume 32, C. J., page 515, the word "injury" is defined as follows:

"The word 'injury' has numerous and comprehensive popular meanings. Thus it may mean an act resulting in damage; an act which damages, harms, or hurts; any wrong, damage, or mischief done or suffered; any wrong or damage done to another, either in his person, rights, reputation or property; * * *"

In view of the above definitions we believe that when a person is deliberately starved he suffers such damage to his person and bodily harm that his life is endangered or his health is injured, or is likely to be injured.

To deliberately starve a minor child, as in the instant case, is to unlawfully and purposely injure him in a manner that would warrant prosecution under Section 4419, supra. However, only the evidence of starvation when the boy was under the age of sixteen years could be used.

Prosecution in the instant case under Section 4419, supra, is not barred by the statute of limitations, as set forth in Section 3782, R. S. Mo. 1939, though the evidence does not clearly disclose any beating having occurred in the last year. Section 3782 provides as follows:

"No person shall be tried, prosecuted or punished for any felony, other than as specified in the next preceding section, unless an indictment be found or information be filed for such offense within three years after the commission of such offense, except indictment or informations for bribery or for corruption in office may be prosecuted

if found or filed within five years after the commission of the offense."

Section 4410, R. S. Mo. 1939, provides as follows:

"If any person shall be maimed wounded or disfigured, or receive great bodily harm, or his life be endangered, by the act, procurement or culpable negligence of another, in cases and under circumstances which would constitute murder or manslaughter if death has ensued, the person by whose act, procurement or negligence such injury or danger of life shall be occasioned shall, in cases not otherwise provided for, be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by both a fine not less than one hundred dollars and imprisonment in the county jail not less than three months, or by fine not less than one hundred dollars."

In State v. Porter, 81 S.W. (2d) 316, prosecution was instituted under Section 4016, R.S. Mo. 1929, which is identical to Section 4410, supra. In that case it was stated in the information that the defendant did unlawfully, willfully and feloniously strike, choke and strangle his victim, whereby the victim did receive great bodily harm and injury, endangering the victim's life. In ruling on the sufficiency of the information, the following was stated at l.c. 318:

"* * * * Under this section the gravamen of the felony is the maiming, wounding, disfiguring, inflicting great bodily harm, or endangering the life of another. See State v. Brown, 60 Mo. 141, loc. cit. 142; State v. Pine, 324 Mo. 194, 198 (3), 23 S.W. (2d) 7, 9 (4). As stated in State v. Agee, 68 Mo. 264, 265: 'We have frequently held that an indictment based on the section referred to need not state that the act was done willfully, intentionally, with malice,

with a deadly or dangerous weapon, or under circumstances which had death ensued, would have constituted murder or manslaughter.' * * * *"

In the case of State v. Nieuhaus, 117 S.W. 73, 217 Mo. 322, there was a prosecution for violation of Section 1849, R.S. Mo. 1899, which is the same as Section 4410, supra. The facts in that case are quite similar to the facts in the instant case. A girl of thirteen years of age was living with a man and his wife, not her parents, and was beaten with a whip and burned with a stove poker by the wife who was the defendant in that case. The following quotation is taken from l.c. 77, in construing Section 1849, R.S. Mo. 1899:

"* * * * This section has often been considered by this court, and it has been uniformly ruled that it is unnecessary for the indictment to state that the act was done willfully, intentionally, with malice, with a deadly or dangerous weapon, or under circumstances which, had death ensued, would have constituted murder or manslaughter. State v. Moore, 65 Mo. 606; Jennings v. State, 9 Mo. 862; State v. Bohannon, 21 Mo. 490; State v. Bailey, 21 Mo. 484."

We believe that beating a person with a rubber hose, or light cord, could inflict great bodily harm or endanger the life of a person, and would constitute murder or manslaughter, if death should ensue. Consequently an information could be filed under Section 4410, supra.

In making our research we have been unable to find any cases where prosecution was instituted under Section 4410, supra, or any similar statute where the means used in committing the crime were starvation. We do believe that to deliberately starve a person can cause great bodily harm by injuring his health and can endanger his life as to uphold prosecution under Section 4410, supra. Should death result from deliberately starving a person, it would probably be murder rather than manslaughter, because the fact that it was deliberate eliminates the possibility of culpable negligence causing death.

In Lewis v. The State of Georgia, 72 Ga. 164, a woman was convicted of murder as the result of severely beating,

starving and exposing to the elements an orphan child left with her when its mother died. From this case the following quotation is taken at l.c. 168:

" * * * * 'It has never been doubted that, if death is the direct consequence of the malicious omission to perform a duty, as of a mother to nourish her infant child, this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter.' * * * * Where a sick or weak person is exposed to cold, with an intent to destroy him, this may amount 'to wilful murder, under the rule that he who wilfully and deliberately does any act which apparently endangers another's life, and thereby occasions his death, shall, unless he clearly prove to the contrary, be adjudged to kill him of malice propense.' * * * *"

In *Pallis v. State*, 26 So. 339, 123 Ala. 12, the defendant was indicted for assault upon her child, with intent to murder. She left her child by the side of the road without clothing or wrappings. At l.c. 339 the following quotation is taken:

"'If the exposure or neglect of an infant or other dependent person, resulting in death, is an act of mere carelessness, wherein danger to life does not clearly appear, the homicide is only manslaughter; whereas, if the exposure or neglect is of a dangerous kind, it is murder. For example, if from an infant of tender years the person under obligation to provide for it willfully withholds needful food or any other needful thing, though not with intent to kill, and by reason thereof the child dies, he commits murder.' * * * *"

From *Territory v. Manton*, 14 Pac. 637, l.c. 638, the following is taken:

" * * * * 'If a man neglects to supply his legitimate child with

suitable food and clothing, or suitably provide for his apprentice whom he is under legal obligation to maintain, and the child or apprentice dies of the neglect, he is guilty of a felonious homicide.' * * * *"

In the instant case, where the responsibility of raising the boy, who was a minor, was assumed, there was also a legal duty to provide him with food. Other cases involving prosecution for murder or manslaughter, where the courts have ruled on death being caused by an omission to act where a duty existed, are State v. Barnes, 141 Tenn. 469, 212 S.W. 100; State v. Noakes, 70 Vt. 247, 40 Atl. 249; State v. Chenoweth, 163 Ind. 94, 71 N.E. 197.

Therefore, we believe that deliberately starving a boy, in the instant case, would inflict great bodily harm or would endanger his life, and prosecution could be instituted under Section 4410, supra.

Conclusion.

In view of the above research, it is the opinion of this office that a complaint and information, in the instant case, could be filed under Section 4419, R.S. Mo. 1939, or Section 4410, R.S. Mo. 1939, based on either the beatings given the boy or on deliberate starvation.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

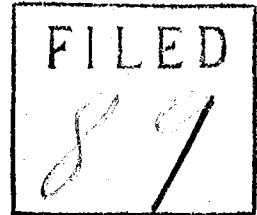
J. E. TAYLOR
Attorney General

RFT:ml

SUPERINTENDENT OF SCHOOLS:
QUO WARRANTO:
SALARIES:

Under Sec. 10617 R.S. 1939, it is mandatory that the County Superintendent of Schools shall not teach school during his term of office. He is subject to ouster if he continues to teach school; however, he is entitled to the salary of the office during his term of office.

December 17, 1945.



Honorable William S. Thompson,
Prosecuting Attorney
Mercer County,
Princeton, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of December 4, 1945, to this department, which reads as follows:

"Section 10617 Revised Statutes of Missouri 1939 - Superintendent shall not teach - provides, among other provisions, as follows: During his term of office the county superintendent shall not engage in teaching or in any other employment that interferes with the duties of his office as prescribed by law.

"The County Court of Mercer County desires your opinion as to whether the Court should refuse to pay the Superintendent's salary in case the Superintendent does teach in addition to holding his office as County School Superintendent.

"Also is there a duty imposed on the County Court to institute proceedings of ouster against the Superintendent in case he teaches in violation of said Section 10617?"

Section 10617 R. S. Mo. 1939, specifically holds in clear and unambiguous language that during the term of office of a county superintendent of schools he shall not engage in teaching. By use of the word "shall" in the foregoing provision, the Legislature apparently intended to make it mandatory upon the county superintendent of schools to refrain from teaching, and not to leave the matter with the discretion of the said superintendent of schools.

In McKittrick v. Wymore, 119 S.W. (2d) 941, 1.c. 944, 343 Mo. 98, the court in construing the word "shall" as ordinarily used, held that it is usually construed as being mandatory. In so holding the court said:

"Respondent argues that the remedy provided by this statute is an exclusive remedy against respondent for misconduct. On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory. If so, said remedy is not exclusive, for it is provided in Sec. 11202 that the offending official 'may be removed therefrom in the manner hereinafter provided' * * *".

Another well established rule of statutory construction is that where a statute is clear and unambiguous, and admits but one meaning, there is no room for construction. (See Cummings v. Kansas City Public Service Company, 66 S.W. (2d) 920, 334 Mo. 672.)

Therefore, we must conclude that it was the full intention of the Legislature in enacting Sec. 10617, supra, that under no circumstances shall the superintendent of schools teach school during his term of office.

You also inquire if there is any duty imposed upon the county court to institute proceedings of ouster against the county superintendent of schools who refuses to discontinue teaching school during his term of office.

Section 12828, R. S. Mo. 1939, provides that when any elective or appointed county officer has failed to devote his time to the performance of his official duties, he shall forfeit his office and may thereafter be removed in the manner hereinafter provided:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance

of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

Section 12829, R. S. Mo. 1939, further provides that any person having knowledge of such violation may file his affidavit with the clerk of the court having jurisdiction of the offense or deposit it with the prosecuting attorney, and it shall then be the duty of the prosecuting attorney, if in his opinion there are sufficient facts in said affidavit, to file a complaint in the circuit court, or he may file such complaint upon his official oath and upon his own affidavit.

Section 12829 reads:

"When any person has knowledge that any official mentioned in section 12828 of this article has failed, personally, to devote his time to the performance of the duties of such office, or has been guilty of any willful, corrupt or fraudulent violations or neglect of any official duty, or has knowingly or willfully failed or refused to perform any official act or duty which by law it was his duty to do or perform with respect to the execution or enforcement of the criminal laws of this state, he may make his affidavit before any person authorized to administer oaths, setting forth the facts constituting such offense and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney or deposit it with the prosecuting attorney, furnishing also the names of witnesses who have knowledge of the facts constituting such offense; and it shall be the duty of the prosecuting attorney, if, in his opinion, the facts stated in said affidavit justify the

prosecution of the official charged, to file a complaint in the circuit court as soon as practicable upon such affidavit, setting forth in plain and concise language the charge against such official, or the prosecuting attorney may file such complaint against such official upon his official oath and upon his own affidavit."

Under Section 1782, R. S. Mo. 1939, any person who shall usurp, intrude into or unlawfully hold or execute any office, the prosecuting attorney of the county in which the action is commenced shall exhibit to the circuit court an information in the nature of a writ of quo warranto at the relation of any person desiring to prosecute same. Said section reads:

"In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the Attorney-General of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney. If such information be filed or exhibited against any person who has usurped, intruded into or is unlawfully holding or executing the office of judge of any judicial circuit, then it shall be the duty of the attorney-general of the state, or circuit or prosecuting attorney of the proper county, to exhibit such information to the circuit court of some county adjoining and outside of such judicial circuit, and nearest to the county in which the person so offending shall reside."

It has been held that quo warranto will lie to determine the right of individuals to exercise the office of school director. In State v. Wymore, 119 S.W. (2d) 914, l.c. 943, the court said:

"Quo warranto will also lie for the purpose of ousting an incumbent whose title to the office has been forfeited by misconduct or other cause. And in such a case it is not necessary that the question of forfeiture should ever before have been presented to any court for judicial determination, but the court, having jurisdiction of the quo warranto proceeding, may determine the question of forfeiture for itself. The question must, however, be judicially determined before he can be ousted."

"And if the alleged ground for ousting the officer is that he has forfeited his office by reason of certain acts or omissions on his part, it must then be judicially determined, before the officer is ousted, that these acts or omissions of themselves work a forfeiture of the office. Mere misconduct, if it does not of itself work a forfeiture, is not sufficient. The court has no power to create a forfeiture, and no power to declare a forfeiture where none already exists. The forfeiture must exist in fact before the action of quo warranto is commenced." Mechem, Public Officers, Sec. 478, p. 308.

"When the court has jurisdiction in quo warranto proceedings it may oust an incumbent from an office which he is holding without right, although the question of the right or of forfeiture, if that is in the case, has never before been presented to any court for judicial determination. The court which has original jurisdiction in quo warranto may determine the question of right or the question of forfeiture for itself, unless the statute provides that forfeiture shall follow a criminal prosecution and sentence, and if the act complained of does not ipso facto create a forfeiture, and is only a misdemeanor in office on account of which the law provides the manner in which the vacancy is to be declared, it is held that quo warranto will not lie." Ency. of Pleading & Practice, Vol. 17, p. 400.

Honorable William S. Thompson,

-6-

See State v. Ellis, 44 S.W. (2d) 129, 1.c. 131; also State v. Baker, 104 S.W. (2d) 729, 1.c. 730.

Therefore, in view of the foregoing statutes and authorities cited, we are of the opinion that any individual, or the county court having knowledge of such violation of the law pertaining to the duties of the office of county superintendent of schools, may, and the county court probably should, file an affidavit with the county prosecuting attorney for ouster of said county superintendent of schools, if said county superintendent of schools refuses to discontinue teaching school during the term of his office.

You further inquire if the county court could refuse to pay the county superintendent of schools the salary of that office while at the same time he is teaching school.

The decisions hold that an officer is entitled to the salary provided for said office, so long as he holds said office; that the salary is an incident to the title to the office and not to the exercise of the duties of said office, and the mere fact that he is teaching during said term, contrary to the statutes provided, does not amount to an abandonment of the office and will not of itself deprive him of the salary of said office.

Volume 46 Corpus Juris, 1014, Sec. 233, in part reads:

"The person rightfully holding an office is entitled to the compensation attached thereto; this right does not rest upon contract, and the principles of law governing contractual relations and obligations in ordinary cases are not applicable. Public officers have no claim for official services rendered except where, and to the extent that, compensation is provided by law, and, when no compensation is so provided, the rendition of such services is deemed to be gratuitous. The right to the compensation attached to a public office is an incident to the title to the office and not to the exercise of the functions of the office; hence, the fact that officers have not performed the duties of the office does not deprive them of the right to compensation, provided their conduct does not amount to an abandonment of the office."

In Cunio v. Franklin County, 315 Mo. 495, 1.c. 407, the court, in approving the above principle of law, said,

Honorable William S. Thompson, -7-

"It is a well-established principle that a salary pertaining to an office is an incident of the office itself, and not to its occupation and exercise, or to the individual discharging the duties of the office.

"On the other hand, it is equally well settled that, if a person exercising the functions of an office is not entitled to the office, he cannot maintain an action for his services."

Therefore, we believe the decisions hereinabove quoted entitle your county superintendent of schools, under the facts stated in your request, to the salary of the office, since he is attending to said official duties, even though he does at the same time teach school. The fact that he is teaching school part of the time does not constitute an abandonment of his office, and he is, therefore, entitled to the salary of said office.

CONCLUSION.

Therefore, under the facts and circumstances in your request, we are of the opinion that said county superintendent of schools should not teach school during his term of office; that it is a direct violation of the law; also, that quo warranto will lie to oust him from said office if he does not discontinue teaching school; and any one having knowledge of this fact may file an affidavit, stating such facts, with the circuit court having jurisdiction thereof, or with the prosecuting attorney of the county, and it then becomes the duty of the prosecuting attorney to institute quo warranto proceedings against said county superintendent of schools, if, in his opinion, the facts contained in the affidavit will justify said action. That the county court can, and, in all probability should, cause such proceedings to be instituted.

Furthermore, under the facts, we are of the opinion that the said county superintendent of schools is entitled to the salary of the office, since the teaching of school at the same time does not constitute an abandonment of the office. That the salary is an incident of the title of the office and not of the exercise of the duties of said office.

APPROVED;

J. E. TAYLOR
Attorney-General

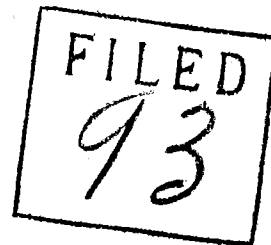
ARH/LD

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

COUNTY OFFICERS: Induction into the Armed Forces does not
create vacancy in office.

January 26, 1945



Honorable Henry C. Walker
Prosecuting Attorney
Kennett, Missouri

Dear Sir:

Reference is made to your letter of January 20, 1945,
requesting an opinion of this office, and reading as follows:

"The Dunklin County Court has instructed
me to write you and ask you for an opinion
in the following matter:

"Charles C. Redman, Jr., was elected County
Surveyor in November, 1940; his term com-
mencing January 1, 1941. He qualified, made
bond and took the oath of office. He has
been in the Armed Services ever since. On
January 5, 1943 he appointed Leonard C.
Carney as his Deputy to serve while he was
in the Armed Forces. The Court advises me
that neither he, nor his deputy, have ever
performed any services for Dunklin County.
At no time has provision for his salary
been made in the budget. On December 20,
1944 he filed a letter with the County Court
asking for the sum of \$4,800, being payment
for four years at \$100 per month. Is the
County liable for the payment of this sum?
If so, what fund can, or should, it be paid
from?"

For convenience in writing the opinion, we have divided
your request into the following elements:

(1) Did the induction of the officer into the Armed Forces create a vacancy in the office of County Surveyor for Dunklin County?

(2) Did the officer have the right to discharge his official duties by deputy while personally absent on active duty in the Armed Forces?

(3) Did the failure of the County Court to include in its budget for each fiscal year of the term of the officer an amount for the payment of the salary of the County Surveyor and Ex Officio County Highway Engineer have the effect of precluding such officer from the collection of such salary?

(4) What amount of salary, if any, is the officer entitled to?

(5) From what source should payment, if any be due, be made?

With respect to (1), we think the cases of State ex rel. McGaughey v. Grayston, 163 S. W. (2d) 335, and State ex inf. McKittrick, Attorney General v. Wilson, 166 S. W. (2d) 499, are controlling. We quote from the last cited case, l. c. 501:

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service.

* * * * *

"We come to the conclusion that there is nothing in the law, constitutional, statutory or common, which requires us to hold that Wall has forfeited his office by becoming a soldier in the army. * * * "

With respect to (2), it is necessary to examine the statutes creating the office. We take notice that the population of Dunklin County, as disclosed by the Federal Census of 1940, is 44,957. No statement to the contrary appearing in your request for an opinion, we presume that the provisions of

the County Highway Engineer law have not been suspended in Dunklin County. Therefore, the following portion of Section 8660, R. S. Missouri, 1939, is directly applicable to the office and to the salary:

"* * * Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

It thereupon becomes apparent that the person elected County Surveyor for Dunklin County is ex officio the County Highway Engineer.

Under Section 13208, R. S. Missouri, 1939, the County Surveyor is authorized to appoint a deputy under the conditions outlined in such section. The decision in *Halter v. Leonard*, 223 Mo. 293, we think, discloses that all official acts performed by the deputy must be in the name of his principal. We, therefore, hold that the duties of the office could have been discharged by the deputy under the official bond of the officer.

This conclusion might be attacked on the ground that the officer was not personally attending to his official duties, in contravention of Article II, Section 8, of the Constitution of Missouri, and Section 12828, R. S. Missouri, 1939. In that regard the opinions in *State ex rel. McGaughey v. Grayston*, 163 S. W. (2d) 335, and *State ex inf. McKittrick, Attorney General v. Wilson*, 166 S. W. (2d) 499, are decisive. In those cases the Supreme Court specifically held that absence on active duty in the Armed Forces did not contravene the constitutional and statutory provisions referred to.

Parenthetically, we call your attention to your statement that a deputy was not appointed until January 5, 1943,

and that no services were ever rendered Dunklin County by either the official or the deputy. These are questions of fact upon which we do not express an opinion.

With respect to (3), we believe that the failure of the County Court to formally budget an allowance for the payment of the salary of the officer does not affect the situation. The salary of the County Surveyor and Ex Officio County Highway Engineer for Dunklin County is fixed by legislative enactment found in the hereinbefore quoted portion of Section 8660, R. S. Missouri, 1939. The precise question then presented is controlled by the decision of the Supreme Court in Gill v. Buchanan County, 346 Mo. 599, from which we quote, l. c. 606:

" * * * The action of the Legislature in fixing salaries of county officers is in effect a direction to the county court to include the necessary amounts in the budget. Such statutes are not in conflict with the County Budget Law but must be read and considered with it in construing it. They amount to a mandate to the county court to budget such amounts. Surely no mere failure to recognize in the budget this annual obligation of the county to pay such salaries could set aside this legislative mandate and prevent the creation of this obligation imposed by proper authority. Certainly such obligations imposed by the Legislature were intended to have priority over other items as to which the county court had discretion to determine whether or not obligations concerning them should be incurred. They must be considered to be in the budget every year because the Legislature has put them in and only the Legislature can take them out or take out any part of these amounts. * * * We, therefore, hold that a county court's failure to budget the proper amounts necessary to pay in full all county officers' salaries fixed by the Legislature, does not affect the county's obligation to pay them."

With respect to (4), we quote from the opinion in State ex rel. Walther v. Johnson, 351 Mo. 293, wherein the Supreme Court in deciding the salary to be paid the County Surveyor and Ex Officio County Highway Engineer in a county having the same population as Dunklin County, and in which the County Court had failed to fix the amount of salary by order, said, l. o. 299:

" * * * Under the proviso the county court does have discretion to fix the annual salary of the county highway engineer at from \$1200.00 to \$2,000.00. As that discretion was not expressly exercised in this case, relator is entitled to the minimum salary. (State ex rel. v. Bulger, 289 Mo. 441, 233 S. W. 486.)"

Your attention is directed to this case for the reason you have not indicated in your opinion request that the County Court had fixed the salary to be paid to the County Highway Engineer by court order, and in the premises the above rule will be applied.

With respect to (5), we hold that if the County Court determines under the facts applied to this particular case that the obligation is due in the entire amount claimed, or some portion thereof, a warrant can be drawn in Class 4 in settlement of such obligation. In the event Class 4 is insufficient in amount to allow the payment of such warrant, the warrant may be drawn against funds in Class 6.

CONCLUSION

In the premises, we are of the opinion that a vacancy in office was not caused by the induction of the County Surveyor and Ex Officio County Highway Engineer into the Armed Forces; that such official so inducted into the Armed Forces could discharge his official duties by deputy during the period of his absence on active military duty; that the failure of the County Court to provide in its budgets for the years 1941 to 1944, inclusive, does not now preclude the officer from collecting the salary established by legislative

Honorable Henry C. Walker

-6-

January 26, 1945

enactment; that the salary to which the officer is legally entitled is the sum of \$1200.00 per annum; and that the County Court is authorized to draw a warrant chargeable to Class 4 in discharge of the obligation.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

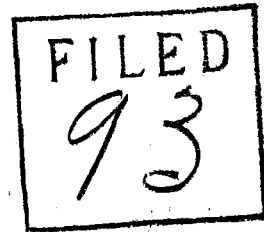
APPROVED:

HARRY H. KAY
(Acting) Attorney General

WFB:HR

SCHOOLS: County school fund cannot be invested in Government bonds and other securities prior to July 1, 1946, unless before said date the Legislature repeals or modifies Sec. 10376, p. 880, Laws of 1943.

March 19, 1945



Honorable Alvin B. Walker
Prosecuting Attorney
Milan, Missouri

Dear Sir:

We have your letter of recent date in which you submit the following for our opinion:

"Sullivan County has on hand and in the Loanable School Fund about \$13000.00. Can the County Court after the 29th. day of March 1945, the effective date of the New Constitution, invest this money in United States Bonds or other bonds as provided in Sec. 7, Art. 9 of the New Constitution, or will such action have to await the enactment of laws by the legislature to put said Sec. 7, Art. 9 in effect?"

Under Section 8 of Article XI of the old Constitution (Laws of 1943, page 1080), it is provided that the county public school fund shall be invested, used and disbursed for free public school purposes, in such manner and at such times as the General Assembly shall by law provide.

The only provision which the General Assembly has made for the investment of such funds is that they shall be invested upon the security of unencumbered real estate, with personal security in addition thereto (Section 10376, page 880, Laws of 1943). Sections 10384, 10384A, 10384B, 10385, and 10386, pages 881-883, Laws of 1943, provide the method and details for such loaning of said funds.

Honorable Alvin B. Walker

-2-

March 19, 1945

Section 2 of the Schedule of the new Constitution of Missouri, adopted by the voters on February 27, 1945, provides as follows:

"All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

The provisions of the statutes above referred to are inconsistent with the provisions of Section 7 of Article IX of the new Constitution, and, therefore, said statutes will remain in full force and effect until July 1, 1946, unless sooner amended or repealed.

CONCLUSION

It is, therefore, the opinion of this office that the county court of a county cannot invest the county school fund in United States bonds or other bonds, as provided in Section 7 of Article IX of the new Constitution, prior to July 1, 1946, unless before said date the General Assembly repeals or modifies Section 10376, page 880, Laws of 1943.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

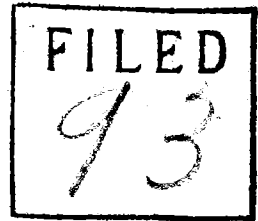
APPROVED:

J. E. TAYLOR
Attorney General

HHK:HR

MOTOR VEHICLES: Chauffeur's license not required of nonresidents holding valid chauffeur's license from home state or country.

April 12, 1945



Mr. Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of April 7th, 1945. Your request reads as follows:

"It is requested that your department furnish an opinion to be used by this organization as a guide in handling the following types of cases:

- "a. When a Government owned vehicle is leased to a private concern to be used in 'for hire' operations, would the drivers of such vehicles be required to have chauffeur's license?
- "b. When a non-resident truck company by virtue of its operation through Missouri is required to purchase Missouri license either through leasee title or otherwise, would the drivers of such vehicles be required to purchase Missouri chauffeur's license regardless of their residence?

"As an example, a truck company domiciled in the State of New Jersey, operates two trucks between Pittsfield, Illinois, and

Kansas City, Missouri. This company has leased the trucks from the legal owner who resides in Chicago, Illinois. The trucks are registered in Missouri on a leasee title and carry Missouri license. The drivers both reside in Illinois and carry Illinois chauffeur's license."

Section 8372, R. S. Mo. 1939, provides as follows:

"(a) Every person desiring to operate a motor vehicle as a chauffeur shall file in the office of the commissioner a statement containing his name, age, address and the trade name, style and motive power of the motor vehicles he is competent to operate, on a blank to be furnished for that purpose by the commissioner. Such application shall be indorsed by two citizens of this state who are registered motor vehicle owners who shall certify to the correctness of the facts stated in such application and the good character of the applicant, and such application shall be accompanied by two duplicate photographs of the applicant of such size as shall be specified by the commissioner, indorsed with the genuine signature of the applicant.

"(b) Upon the filing of such statement and photographs, if the commissioner is satisfied as to the competency and good character of such applicant, he shall assign to him a number and upon the payment of a fee of \$3.00 he shall issue and deliver to such applicant a certificate of registration which shall contain the name and address of the person registered and the words 'Registered chauffeur number, Missouri motor vehicle law' (with the number so assigned inserted) and one of the photographs of

the applicant. Such certificate shall be indorsed by the genuine signature of the person to whom it is issued.

"(c) The commissioner shall also furnish to such applicant, without further charge, a suitable metal badge of such size as the commissioner may determine which shall bear thereon the words 'Registered chauffeur number, Missouri motor vehicle law' (with the registry number inserted thereon) and said badge shall be thereafter worn by such chauffeur upon his clothing in a conspicuous place at all times when he is operating a motor vehicle on the highways. No certificate of registration as chauffeur shall be issued to any person under the age of eighteen years."

Section 8373, R. S. Mo. 1939, provides as follows:

"(a) Every person desiring to operate a motor vehicle as a registered operator shall file in the office of the commissioner a statement containing his name, age and address, and the trade name and motive power of the motor vehicle he is competent to operate, on a blank to be furnished by the commissioner for that purpose, which shall be indorsed by two citizens of this state who are registered motor vehicle owners, who shall certify to the correctness of the facts stated in such application and the good character of such applicant.

"(b) Upon the filing of such statement and the payment of a fee of \$3.00, the commissioner shall issue and deliver to the applicant a certificate of registration, which shall contain the name and address of the person registered and the words 'Registered operator number, Missouri motor vehicle law' (with the

registration number inserted therein). Such certificate shall be indorsed by the genuine signature of the person to whom it is issued. No certificate as a registered operator shall be issued to any person under the age of eighteen years."

Section 8445, R. S. Mo. 1939, which sets out exemptions from license laws, provides as follows:

"3. A nonresident who is at least eighteen (18) years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home State or country may operate a motor vehicle in this State either as an operator or chauffeur, except any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this State."

CONCLUSION

It is, therefore, the opinion of this Department that:

(a) If the lessee of a government owned vehicle, leased to be used in "for hire" operations, is a resident of the State of Missouri a chauffeur's license would be required for anyone accepting employment as a chauffeur from the lessee to operate a motor vehicle in the State of Missouri; however, if the lessee is a nonresident of the State of Missouri, any of his employees who are nonresidents, and are at least eighteen years of age and have in their immediate possession a valid chauffeur's license issued to them in their home state or country, may operate a motor vehicle in this state as a chauffeur without registering as a chauffeur in the State of Missouri.

Mr. Hugh H. Waggoner

(5)

April 12, 1945

(b) A nonresident, who is at least eighteen years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home state or country, may operate a motor vehicle in this state either as an operator or chauffeur.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

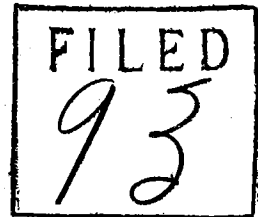
APPROVED:

J. E. TAYLOR
Attorney General

AVO:CP

TAXATION AND REVENUE: Maximum levies permitted for county and township revenue and township road and bridge purposes, under the Constitution of 1945.

April 30, 1945



Honorable Henry C. Walker
Prosecuting Attorney
Kennett, Missouri

Dear Sir:

Reference is made to your letter dated April 25, 1945, requesting an official opinion of this office, and reading as follows:

"Dunklin County operates under Township Organization. The Township Boards of some of the Townships in this county believe that under the New Constitution the rate at which they may levy taxes has been increased. This has been submitted to the County Court, and they have instructed me to write and request your opinion in this matter.

"The assessed valuation of the property in Dunklin County is \$14,000,000.00.

"Does the New Constitution raise the rate at which the County and the Townships may levy taxes for County Revenue, Township Revenue and Road and Bridge purposes?

"What is the maximum legal rate at which the County and Township may levy taxes in this county for County Revenue, Township Revenue and Road and Bridge purposes?"

With respect to the first question proposed, we believe the following to be in point:

The maximum levy for county and township revenue is presently fixed by a statute found in Laws of 1943, at page 1008, reading, in part, as follows:

"For county purposes the annual tax on property * * * shall not in any county in this state exceed the rates herein specified: In counties having thirty million dollars or less said rate shall not exceed fifty cents on the hundred dollars valuation; * * *."

The maximum levy for township road and bridge purposes is presently fixed by Section 8821, R. S. Mo. 1939, reading, in part, as follows:

"The township board of directors of any township may, annually, in their discretion, * * * levy an annual tax * * * in any amount not exceeding twenty-five cents on each one hundred dollars valuation on all property subject to taxation in such township, * * *."

Article X, Section 11, of the Constitution of 1945 provides, in part, as follows:

"Taxes may be levied by counties and other political subdivisions on all property subject to their taxing power, * * *."

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

* * * * *

"For counties--thirty-five cents on the hundred dollars assessed valuation in counties having three hundred million dollars, or

more, assessed valuation, and fifty cents on the hundred dollars assessed valuation in all other counties; * * *."

Article X, Section 12, of the Constitution of 1945 provides, in part, as follows:

" * * * the township board of directors in the counties under township organization, * * * may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation. * * *"

Upon comparison of the statutes and constitutional provisions cited, it becomes apparent that the maximum rates for county and township revenue purposes remain unchanged; and that an increase from twenty-five cents to thirty-five cents per one hundred dollars valuation has been made with respect to the township road and bridge tax.

With respect to the second question you propose, we think the following to be in point:

In view of the fact that each of the limitations on the maximum levies are now found in statutes, it becomes of importance to examine Section 2 of the Schedule appended to the Constitution of 1945, which reads, in part, as follows:

" * * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946. "

This section has the effect of keeping the statutes imposing the limitations upon levies for the various purposes in full force and effect until July 1, 1946, unless such statutes be sooner repealed or amended by the General Assembly.

April 30, 1945

CONCLUSION

In the premises, we are of the opinion that no change will be made by the Constitution of 1945 with respect to the maximum levies permitted for county and township revenue purposes in your county, and that the levy for road and bridge purposes will be increased from a maximum of twenty-five cents per one hundred dollars assessed valuation to thirty-five cents per one hundred dollars assessed valuation, under the new Constitution.

We are of the further opinion that in preparing the levies for computing taxes to be collected in 1945, the county court and township boards of directors must fix such levies within the limitations imposed by the statute found in Laws of 1943, at page 1008, and Section 8821, R. S. Mo. 1939, for the reason that such statutes are, under the express provisions of Section 2 of the Schedule appended to the Constitution of 1945, in full force and effect until July 1, 1946, unless sooner repealed or amended by the General Assembly.

Respectfully submitted

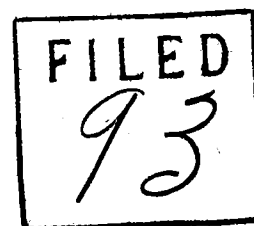
WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:IR

MOTOR VEHICLES: Unlawful to use red lights on front of vehicle without special permission; not unlawful to use sirens.



August 8, 1945

Hon. Hugh H. Waggoner, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"Your attention is directed to Sections 8386 and 8386f, Laws of Missouri 1941, wherein the Commissioner of Motor Vehicles is authorized upon receipt of proper application, to issue permits for the display of red warning lights of certain motor vehicles.

"Since last fall, when the Commissioner wrote to our department for assistance in the issuing of red warning light permits, the following procedure is carried out. When a request for a 'red light' permit is received by the Motor Vehicle Department the application is sent to the Patrol, and the troopers working in that area are instructed to investigate the request, with the following guides in mind: Is the vehicle actually an emergency vehicle; what is the vehicle intended to be used for; the nature of the applicant's employment, his character, general reputation and the necessity for the display of a red warning light on his automobile. A copy of the investigating officer's report, with his recommendations, is then sent to the Motor Vehicle Department. The approval or rejection of the permit is usually determined by the investigating officer's report.

"The practice as outlined above works very well, but our problem is this: Many motorists get and install the red light and today in some areas red lights are very common--there are a few sirens, also. How can we legally cause or bring about the removal of these unauthorized red lights and sirens?

August 8, 1945

"We are experiencing difficulties in various counties throughout the State, where a 'red light' epidemic is in progress, of securing the proper prosecution against those individuals. In other words, prosecuting attorneys claim this law is vague and weak.

"We should like to have your advise or opinion as to how we can handle this problem."

The sections referred to in your letter are part of an act of the Legislature found at page 438, Laws of Missouri, 1941, and we shall hereinafter refer to various sections as being sections of this act.

Section 8386f of the act reads as follows:

"Headlamps, when lighted shall exhibit lights substantially white in color; auxiliary lamps, cowl lamps and spot lamps, when lighted, shall exhibit lights substantially white, yellow or amber in color. No person shall drive or move any vehicle or equipment, except an emergency vehicle authorized by the commissioner, upon any street or highway with any lamp or device thereon displaying a red light visible from directly in front thereof."

It will be seen by the foregoing section that no person is permitted to use a red light on the front of his motor vehicle except when such vehicle is an emergency vehicle which has been approved by the Commissioner of Motor Vehicles as an emergency vehicle. Section 8386 of the act gives the commissioner authority to pass upon applications for permission to use particular lighting devices. Said section reads as follows:

"The Commissioner of Motor Vehicles is hereby given authority to pass upon the lighting equipment of any vehicle, motor vehicle, or motor-drawn vehicle with a view to its safety for use on a street or highway. The Commissioner is hereby authorized to promulgate rules and regulations not inconsistent with this chapter and publish same. The Commissioner may require the approval of any lighting equipment or lighting device, and charge a fee therefor of \$50.00 for each device or each single lighting device submitted for approval, and may set up the procedure

which may be followed when any lighting equipment or lighting device is submitted for approval. The Commissioner may revoke or suspend for cause, after hearing, any certificate of approval that may be issued covering any lighting equipment or lighting device under this article."

Therefore, if a motor vehicle owner thinks his vehicle is an emergency vehicle and he desires permission to use a red light on the front of same, he can make application to the Commissioner for permission so to do. If the commissioner denies his application, he can appeal to the members of the State Highway Commission and the Secretary of State, and if not satisfied with their decision, he can have his application reviewed by the Circuit Court by complying with the Provisions of Section 8386t of the act. A complete method is, therefore, set up for those entitled to use red lights on the front of motor vehicles to obtain proper permission so to do. Using a red light on the front of a motor vehicle without having obtained such permission would be in violation of Section 8386f, supra.

Section 8386a of the act provides a penalty for violating any of the provisions of the act. Said section reads as follows:

"Any person violating any of the provisions of this act shall, upon conviction thereof, be deemed guilty of a misdemeanor. The term 'person' as used in this act shall mean and include any individual, association, joint stock company, co-partnership or corporation.

We see nothing vague or weak about this act in so far as it relates to the use of red lights. If a person uses a red light on the front of his motor vehicle without permission, he is subject to prosecution in the same manner as if he violated any other law. Section 8386g permits a motor vehicle to be equipped with not to exceed three auxiliary lamps in front, and Section 8386i authorizes a person to use a spot lamp, but these sections do not authorize those lamps to reflect a red light. Section 8386f specifically provides that:

"Auxiliary lamps, cowl lamps and spot lamps, when lighted, shall exhibit lights substantially white, yellow or amber in color."

Nothing in any of the various sections authorizes the use of red lights on the front of a motor vehicle, except the provision in Section 8386f, supra, and use of a red light

August 8, 1945

on the front of a motor vehicle without a permit issued by the Commissioner of Motor Vehicles is a violation of law.

There can be no question as to the right of the state to make regulations as to the kind of lights to be used on motor vehicles. In *Schwartzman Service, Inc., v. Stahl et al.*, 60 F/ (2d) 1034, the District Court, Western District of Missouri, Central Division, said (l.c. 1037):

"At the outset it must be acknowledged that the state has the power to regulate and control the movements of motor vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection of the highways.

* * * * *

The highways belong to the state. It may make provisions appropriate for securing the safety and convenience of the public in the use of them."

In *Ex Parte Kneidler*, 243 Mo. 632, l.c. 641, the Court said:

"Common observation and experience show that unrestricted use of motor vehicles on public streets would be extremely dangerous to life and limb and the property of the public. Their use thus becomes a fit subject for state regulation. Every person who operates or uses a motor vehicle must be regarded as exercising a privilege, and not an unrestricted right. It being a privilege granted by the Legislature, a person enjoying such privilege must take it subject to all proper restrictions."

As to the use of sirens on a motor vehicle, we find a somewhat different situation. Section 8387, R. S. Mo. 1939, provides in part as follows:

"(a) Signaling devices: Every motor vehicle shall be equipped with a horn, directed forward, or whistle in good working order, capable of emitting a sound adequate in quantity and volume to give warning of the approach of such vehicle to other users of the highway and to pedestrians. Such signaling device shall be used for warning purposes only and shall not be used for making any unnecessary noise, and no other sound-producing signaling device shall be used at any time.

August 8, 1945

By the foregoing section each motor vehicle is required to be equipped with a horn or whistle "capable of emitting a sound adequate in quantity and volume to give warning of the approach of such vehicles to other users of the highway and to pedestrians." It will be noticed that the statute does not describe the kind of sound which shall be given, except that it shall be adequate in quantity and volume to give warning of the approach of the vehicle. The Statute specifically authorizes the use of a whistle as well as a horn, and the Statute does not define what kind of horns or whistles can be used. In Webster's New International Dictionary, we find the following definition of a horn:

"A horn-shaped element of a mechanism, as an electric horn (which see)."

The same authority defines an electric horn as:

"A device for producing sound signals, consisting of * * * *"

The same authority defines a whistle as:

"An instrument for producing^a/shrill whistling sound."

The same authority defines a siren as:

"A device for sounding signals, esp. of warning, as on a steamer or automobile."

In the light of the above definitions, we cannot say that a siren is not a horn or even a whistle. The Statute authorizes the use of a horn or a whistle without specifically defining either, and from the best definitions we can obtain, it would appear that a siren might be classed as a horn or a whistle. Criminal Statutes must strictly construed and, therefore, if an effort were made to prosecute a person for using a siren, it would be necessary that the law clearly forbid the use of such an instrument. We do not believe the Statutes are clear in forbidding the use of a siren on a motor vehicle.

It should be noticed, however, that by Section 8387:

"Such signaling device shall be used for warning purposes only and shall not be used for making any unnecessary noise."

If, therefore, a motorist uses a siren for the mere purpose of making unnecessary noises, he would be violating

August 8, 1945

said Section 8387. Section 8404 (d) provides as follows:

"(d) Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two year, or by both such fine and imprisonment."

It would seem, therefore, that the only remedy which the State would have to combat the use of sirens on automobiles is criminal prosecution for using such sirens to make unnecessary noises. However, we would advise caution in the use of criminal prosecution in such cases, because we can readily see how it would be very difficult to convict a person of such a charge. He could easily claim that he was trying to give warning of the approach of his automobile and thereby raise a doubt in a jury's mind as to whether he was intentionally making unnecessary noises. It would only be in an aggravated case that the State could hope to obtain a conviction.

CONCLUSION

It is, therefore, the opinion of this office that (a) a person who uses a red light on the front of his motor vehicle without having obtained permission from the Commissioner of Motor Vehicles so to do is guilty of violating Section 8386f, P. 440, Laws 1941, and is subject to the penalties provided by Section 8386a, P. 439, Laws 1941; (b) it is not unlawful for a motor vehicle to be equipped with a siren; but (c) a person who would use a siren to make unnecessary noises violates the provision of Section 8387, R. S. No., 1939, and would be subject to the penalties provided by Section 8404 (d) R. S. No., 1939.

Respectfully Submitted,

HARRY M. KAY
Assistant Attorney General

APPROVED:

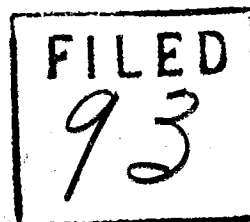
J. E. TAYLOR
Attorney General

RHK/vlv

DISPOSITION OF STOLEN PROPERTY: In possession

DISPOSITION OF ILLEGAL PROPERTY: of police officers.

August 30, 1945



10-1
Honorable Hugh H. Waggoner
Superintendent, Missouri State
Highway Patrol
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based on the following facts:

"A recent inventory of our Troop at Lee's Summit shows numerous items listed as confiscated property. These items include an electric iron which was taken from a shoplifter about five years ago. The owner could not be determined. We have twelve quarts of motor oil which came from a series of station burglaries and the owner could not be located. Five slot machines were confiscated about five years ago in a series of gambling raids conducted by members of this department and the Attorney General's Office. There is no court record of these machines that we can determine.

"We have seven tires, five truck tires and two passenger car tires which were confiscated in that part of the state as being taken in a series of tire thefts and burglaries. We have no record as to who the owner is.

"We would like to have information as to how we can go about disposing of this property as this troop is the

August 30, 1945

first one inventoried and we expect to have an accumulation of such property after we have completed our inventory for the whole state."

We notice in your letter that in all probability there will be other properties inventoried, which properties may not be covered in your request for this opinion, so we are including the procedure of the disposition of several other articles which your department may have in their possession.

We call your attention to Section 4164, R.S. Mo. 1939, which deals with the retention of stolen property by officers receiving same. Said section reads:

"When property alleged to have been stolen, purloined, embezzled or obtained by false pretenses, or to have been obtained in any of the modes specified in the article concerning offenses against public and private property, shall come into the custody of any sheriff, coroner, constable, marshal, or any person authorized to perform the duties of such officers, he shall hold the same subject to the order of the court or officer authorized to direct the disposition thereof."

Section 4165, R.S. Mo. 1939, deals with the return of stolen property to the owners of same when they can be found, and reads:

"Upon receiving satisfactory proof of the title of any owner of such property, the magistrate who shall take the examination of the person accused of any of the offenses referred to in the preceding section, may order the same to be delivered to such owner, on his paying the reasonable and necessary expenses incurred in the preservation of such property, to be certified by such magistrate, which order shall entitle the owner to demand and receive such property."

Section 4168, R.S. Mo. 1939, permits the sale of stolen property when it is not claimed by the rightful owner, and is

as follows:

"If such property shall not be claimed by the owner within six months from the time any person shall have been convicted of obtaining it, in any of the modes referred to in this article, the court or magistrate authorized by the preceding provisions to order a restoration, may order the same to be sold, and the proceeds of the sale, after payment of the expenses of the preservation and sale of the property, shall be paid into the county treasury for the use of the county."

Section 4170, R.S. Mo. 1939, requires a description in writing of the property sold to be filed with the court or officer making the order of sale, so that the owner may identify the same, if he shall claim the proceeds thereafter.

The above sections apply to all stolen property of a legal nature, and the disposition of said property should be handled within the county wherein it was confiscated and by order of the court in which the defendant was prosecuted. It is our suggestion that in obtaining the proper orders of the court for disposition of this property your department should consult the Prosecuting Attorney in the particular county where the case arose.

Section 4173, R.S. Mo. 1939, deals with the disposition of property that is illegal in nature, and provides:

"Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles hereinafter named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:

"First - Any gaming table or gambling device prohibited by law.

"Second - Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained.

"Third - Any of the following articles, kept for the purpose of being sold, given away or otherwise distributed or circulated, contrary to law, viz.: pills, powders, medicines, drugs or nostrums, or instruments or other articles or devices for preventing conception, producing or procuring abortion or miscarriage, or other indecent or immoral use, or any letters, handbills, cards, circulars, books, pamphlets, advertisements or notices of any kind describing or purporting to describe any of such articles, or giving information, directly or indirectly, when, where, how, or of whom any of such things can be obtained.

"Fourth - All articles or raw materials found in the possession of any person or persons intending to manufacture the same into any articles or things heretofore in this section described, and also all tools, machinery, implements and personal property where such articles are found and seized and used or intended to be used in the manufacture of such articles and things."

Section 4175, R.S. Mo. 1939, provides for a notice to persons owning, or who might claim, an interest in such property, and reads:

"The judge or justice issuing the warrant shall set a day, not less than

five days nor more than twenty days, after the date of such service and seizure, for determining whether such property is the kind of property mentioned in section 4173, and shall order the officer having such property in charge to retain possession of the same until after such hearing. Written notice of the date and place of such hearing shall be given, at least five days before such date, by posting a copy of such notice in a conspicuous place upon the premises in which such property is seized, and by delivering a copy of such notice to any person claiming an interest in such property, whose name may be known to the person making the complaint or to the officer issuing or serving such warrant, or leaving the same at the usual place of abode of such person with any member of his family or household above the age of fifteen years. Such notice shall be signed by the justice or judge or by the clerk of the court of such judge."

Section 4177, R.S. Mo. 1939, gives the judge or justice before whom such a cause may be heard the right to order the said illegal property destroyed, and is as follows:

"If the judge or justice hearing such cause shall determine that the property or articles are of the kind hereinbefore mentioned, he shall cause the same to be publicly destroyed, by burning or otherwise, and if he find that such property is not of the kind mentioned, he shall order the same returned to its owner. If it appear that it may be necessary to use such articles or property as evidence in any criminal prosecution, the judge or justice shall order the officer having possession of them to retain such possession until such necessity no longer exists, and they shall neither be destroyed nor returned to the owner until they are no longer needed as such evidence."

August 30, 1945

In cases where this property has been seized without a search warrant, or cases in which no criminal prosecution was had and where it is impossible to follow the procedure as outlined in the preceding statutes, illegal property may be destroyed by the officers without an order from a justice or a magistrate. The Supreme Court of Missouri, in considering the question of slot machines or gambling devices which can have no lawful purpose, stated in the case of State v. Joynt, 110 S.W. (2d) 737, l.c. 740:

"* * * * The maintenance of this device described by the owner as a gambling device, capable of no lawful use and being extensively used and displayed by the owner and his licenses for public play, is a public nuisance, and the police under their general powers have the right to seize it and destroy it summarily. In addition to offending our criminal laws, it is an offense to public order and welfare as well. 'At the common law acts done in violation of the law, or which are against good morals or public decency, and which result in injury to the public, constitute a public nuisance. ' * * * *"

The court, in discussing a similar situation and commenting on the Joynt case, supra, said in the case of State v. Frankenhoff, 125 S.W. (2d) 816, l.c. 818:

"Therefore, under our ruling in State ex rel. v. Joynt, supra, we hold that the machines in question were unlawful property and not protected by law, regardless of the manner in which they were seized.
* * * *"

It is anticipated that some of the slot machines which your department has seized might contain money. Under date of October 23, 1934, this department issued an opinion to the Honorable Herbert M. Braden, Prosecuting Attorney of Livingston County, Missouri, which dealt with the disposition of money found in slot machines. A copy of this opinion is enclosed for your use in the event money is found in any of the slot machines that you have in your possession.

August 30, 1945

Conclusion.

It is the opinion of this department that illegal property seized by police officers may be destroyed; also that any money taken from slot machines, gambling devices or other illegal gambling devices, as described in Section 4173, supra, if unclaimed by the owner thereof shall be turned into the general revenue fund of the county in which said devices were confiscated. Further, it is the opinion of this department that stolen property of a legal nature seized by police officers may be sold, if not claimed, and delivered to the rightful owner thereof.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

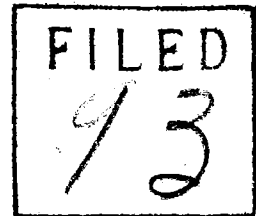
APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml
Enc.

MOTOR VEHICLES: Motor scooter is a motor vehicle; must be registered and licensed, and driver's license law applies to persons operating same.

September 7, 1945



Honorable Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Col. Waggoner:

The Attorney General wishes to acknowledge receipt of your request of September 6, 1945, for an opinion upon the questions contained in the following letter:

"A situation has arisen in St. Louis County wherein boys and girls ranging in ages from twelve to fifteen years are operating motor scooters. The chiefs of police in the incorporated cities of St. Louis County and the sheriff's office are not clear on the section of law pertaining to licensing of such vehicles, and as to whether boys and girls of that age are within the law in operating them.

"This department has been called upon by the people of St. Louis County to attend a meeting to be held next Tuesday, September 11, for the purpose of determining whether these individuals can legally own and operate these motor scooters and still be within the law.

"Request your advice or opinion as to whether or not anyone under the age of sixteen years would be permitted to own and operate a motor scooter."

The State in the exercise of its police power has enacted laws controlling the operation of vehicles upon the public

highways, The laws relating to self-propelled vehicles are found in Chapter 45, Article 1, R. S. Mo. 1939. Section 8367 of this article contains definitions of the terms used in the article, and the following definitions are pertinent to your inquiry:

"'Motor vehicle.' Any self-propelled vehicle not operated exclusively upon tracks."

"'Motorcycle.' A motor vehicle operated on two wheels."

"'Motor tricycle.' A motor vehicle operated on three wheels, including a motorcycle while operated with any conveyance, temporary or otherwise, requiring the use of a third wheel."

Your letter does not contain any description of a "motor scooter" and the writer is not familiar with the construction of one. However, if a motor scooter is self-propelled and not operated exclusively on tracks, then it would be a motor vehicle. If the motor scooter you have in mind is operated on two wheels, as some of them are, then the definition of a "motorcycle" would cover the motor scooter, and if operated on three wheels then the motor scooter would come under the classification of "motortricycle."

Section 8369, Art. 1, Chap. 45, requires the registration of all motor vehicles operated on the highways of this State. This section is, in part, as follows:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration on a blank to be furnished by the commissioner for that purpose, containing: (1) a brief description of the motor vehicle to be registered, including the name of the manufacturer, the motor number and character, and amount of motive

power, stated in figures of horsepower;
(2) the name, residence and business address of the owner of such motor vehicle;
(3) if said motor vehicle be a commercial vehicle the weight of the vehicle and its rated capacity of live load, in pounds or seating capacity; (4) if such motor vehicle be a specially constructed or reconstructed motor vehicle, the application shall so state and the owner shall furnish the commissioner such additional information as he shall require.

"(b) Upon the filing of such application, exhibition of certificate of ownership and the payment of the fees hereinafter provided, the commissioner shall assign a number, to such motor vehicle, and without other expense to the applicant shall issue and deliver to the owner a certificate of registration in such form as the commissioner shall prescribe, and a plate, or set of plates, bearing such number."

This section also contains the schedule of fees to be charged for the registration of motor vehicles, a part of which schedule is as follows:

"For motor vehicles other than commercial motor vehicles and motorcycles and motortricycles.

| | |
|---|---------|
| Less than 12 horsepower | \$ 5.00 |
| 12 horsepower and less than 24 horsepower | 8.50 |
| 24 horsepower and less than 36 horsepower | 11.00 |
| 36 horsepower and less than 48 horsepower | 20.00 |
| 48 horsepower and less than 60 horsepower | 25.00 |
| 60 horsepower and less than 72 horsepower | 31.50 |
| 72 horsepower and more | 37.50 |
| Motorcycles | 6.00 |
| Motortricycles | 7.50" |

A motor scooter being a self-propelled vehicle not operated exclusively on tracks, regardless of what trade name or manufacturer's name may be applied to it, under the definitions herein set out is a motor vehicle and as such must be registered and the registration fee fixed for a vehicle of the class to which it belongs must be paid. And whenever any such motor scooter is operated upon the highways of this State, it must have displayed thereon the registration plate or plates required, showing the registration number.

In Article 3 of Chapter 45, R. S. Mo. 1939, is the "Driver's License Law." Section 8443 of this article and chapter contains definitions of the terms used in the article and attention is directed to these definitions:

"(a) Motor vehicle. Any self-propelled vehicle not operated exclusively upon tracks.

"(b) Farm tractor. Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, threshing machines, and other implements of husbandry.

"(c) School bus. Every motor vehicle owned by a public or governmental agency and operated for the transportation of children to or from school or privately owned and operated for compensation for the transportation of children to or from school.

"(d) Person. Every natural person, firm, copartnership, association or corporation.

"(e) Operator. Every person, other than a chauffeur or registered operator, who is in actual physical control of a motor vehicle upon a highway.

"(f) 'Chauffeur'. An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare or (b) who as owner or employee operates a motor vehicle carrying passengers or property for hire.

"(f-1) 'Registered operator.' An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle.

"(g) Owner. A person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this article.

"(h) Nonresident. Every person who is not a resident of this State.

"(i) 'Highway.' Any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality.

"(j) Commissioner. The commissioner of motor vehicles of this State.

"(k) Department. The department of motor vehicles of this State acting directly or through its only authorized officers and agents."

Section 8444 of this article and chapter requires that persons operating a motor vehicle upon the highways shall be licensed as operators. This section is as follows:

"(a) It shall be unlawful for any person except those hereinafter expressly exempted to drive any motor vehicle upon any highway in this state unless such person has a valid license as an operator under the provisions of this article.

"(b) Any person holding a valid chauffeur's license or registered operator's license, as provided in Sections 8372 and 8373, need not procure an operator's license."

Section 8445 of the same article and chapter contains a list of persons who are exempt from the application of the Driver's License Law. This section is as follows:

"1. Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway.

"2. A nonresident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home State or country may operate a motor vehicle in this State only as an operator.

"3. A nonresident who is at least eighteen (18) years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home State or country may operate a motor vehicle in this State either as an operator or chauffeur, except any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this State.

"4. Any nonresident who is at least eighteen (18) years of age, whose home State or country does not require the licensing of operators, may operate a motor vehicle as an operator only, for a period of not more than sixty (60) days in any calendar year, if the motor vehicle so operated is duly registered in the home State or country of such nonresident."

And Section 8446 of the same article and chapter prohibits the Commissioner from issuing a license to certain persons. Said section provides:

Sept. 7, 1945

"The commissioner shall not issue any license hereunder:

"1. To any person, as an operator, who is under the age of sixteen (16) years;

"2. To any person, as an operator, whose license has been suspended during such suspension nor to any person whose license has been revoked, until the expiration of one (1) year after such license was revoked."

Under the Driver's License Law a person under the age of sixteen (16) cannot procure a driver's license and could therefore not operate any type of motor vehicle, for which a driver's license is required, upon the highways of Missouri.

Conclusion

From the foregoing it is the opinion of this office that a motor scooter is a motor vehicle and as such must be registered and licensed and that the provisions of the Driver's License Law apply to a person operating a motor scooter upon the highways of this State.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

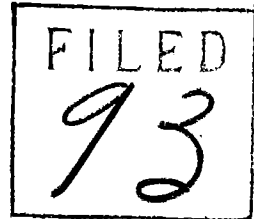
APPROVED:

J. E. TAYLOR
Attorney General

WOJ:EG

COUNTY TREASURER: Should not pay surplus arising from sale of land for taxes to grantee in quitclaim deed from former owner unless deed contains provisions transferring right to claim surplus.

October 17, 1945



Honorable Henry C. Walker
Prosecuting Attorney
Kennett, Missouri

10-26

Dear Mr. Walker:

Under date of August 2, 1945, you wrote the Attorney General making the following request for an opinion:

"The County Court of Dunklin County has instructed me to write you and request your opinion on the following questions.

"A parcel of land was sold under the Jones-Munger law in 1934. After the delinquent taxes and costs were paid there remained a surplus of \$464.25 in the Ex-officio Collector's hands. No owner claimed this money, and it was paid into the county treasury, as provided in Sec. 11159 R. S. Mo. 1939. On November 30, 1934, the date of said sale Gustave W. Niemann was the record owner of the land. On July 7, 1945 Gustave W. Niemann gave a Quit Claim Deed to said land to W. B. Presley for the consideration of \$5.00. This is just a straight Quit Claim Deed, and there is no assignment therein. After the execution of said Deed, W. B. Presley filed his claim with the County Court claiming the surplus from the sale of said land remaining in the County Treasury.

"Question: Is the grantee in a Quit-Claim Deed, made after the sale of land for delinquent taxes, from the owner of the land at the time of the sale thereof, entitled to the surplus money from the sale of said land, upon filing a claim with the County Court? "

The delay in furnishing this opinion is regretted very much but at the time of the request the office was badly understaffed and there was a great amount of business on hand; some of which required immediate attention, so that matters which did not seem to require immediate attention were laid over until the more pressing matters were taken care of.

It would be better to have the question determined by a court of competent jurisdiction than to rely upon an opinion from this office. The determination by a court would be final and the opinion of this office is not. If the county treasurer should rely upon this opinion and act accordingly, there still would remain the possibility of litigation. A further reason for this suggestion is that the deed is not before us and we have no knowledge of the circumstances surrounding the making of the deed nor of the intention of the parties, both of which can be of importance in determining the effect of the deed.

Section 11159, R. S. Mo. 1939, referred to in your letter, is as follows:

"When real estate has been sold for taxes or other debt by the sheriff or collector of any county within the state of Missouri, and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff or collector of the county, when such sale has been or may hereafter be made, to make a written statement describing each

parcel or tract of land sold by him for a greater amount than the debt or taxes and all costs in the case, and for which no owner or owners, agent or agents can be found, together with the amount of surplus money in each case, which statement shall be subscribed and sworn to by the sheriff or collector making the same before some officer competent to administer oaths within this state, and then presented to the county court of the county where such sale has been or may hereafter be made; and on the approval of the statement by the court, the sheriff or collector making the same shall pay the said surplus money into the county treasury, take the receipt in duplicate of said treasurer for said overplus of money and retain one of the said duplicate receipts himself and file the other with the county court, and thereupon the court shall charge said treasurer with said amount. And said treasurer shall place such moneys to the credit of the school fund of the county, to be held in trust for the term of twenty years for the owner or owners or their legal representatives. And at the end of twenty years, if such fund shall not be called for, then it shall become a permanent school fund of the county. County courts shall compel owners or agents to make satisfactory proof of their claims before receiving their money: Provided, that no county shall pay interest to the claimant of any such fund."

Under this section of the statutes the county treasurer, for a period of twenty years, holds the money, under the supervision of the county court, as a trustee for the owner of the land at the time of the sale or for his agent. It is the duty of the treasurer for this period of twenty years, upon

satisfactory proof to the county court, to pay the money to the owner of the land at the time of the sale or to his assigns or legal representatives. Reid v. Mullins, 48 Mo. 344, 345.

The position of the county treasurer being clear, it is necessary to determine, the effect of a quitclaim deed, to land sold for taxes, executed several years after the tax sale, and whether or not such a quitclaim deed would convey the ownership of the surplus arising from such tax sale after all taxes and costs of sale were paid.

As previously mentioned, we do not have the quitclaim deed and must assume that it is in usual form and that the words used are, "remise, release and forever quit claim," and that the property quitclaimed is the land described, together with "all the rights, immunities, privileges and appurtenances thereto belonging." If this assumption is not correct then what follows would not be applicable.

Attention is directed to the following brief quotation from the case of Williams v. Reid, 37 S. W. (2d) 537, 1. c. 541 (Mo. Sup.):

"* * * To remise, release, and quitclaim designated land is generally understood to mean that the grantor releases any interest he may have in the land at the time, but that is all."

Under the quitclaim deed only such interest as the grantor had in the premises at the date of the deed passed, C. J., Vol. 18, p. 314, par. 299; Shelton v. Horrell, 232 Mo. 358. This being true, no interest in the premises described in the deed passed to the grantee, for the interest of the grantor in the land had been terminated by the foreclosure of the tax lien if the tax sale was regular and valid. And in the existing situation it must be assumed the proceedings were regular and valid, as over ten years had elapsed between the time of the sale and the date of the quitclaim deed.

The owner at the time of the sale having quitclaimed his interest in the land, together with "all rights, immunities, privileges and appurtenances thereto belonging," it is necessary to ascertain what these words cover.

It is a general rule that the deed to property covers all rights, privileges and immunities, rightfully belonging to the property deeded, which are essential to a full enjoyment of the property. C. J. S., Vol. 26, p. 386, Sec. 106. These things include buildings, fences, easements, right of ways etc., but do not include movable personal property on the land or personal rights arising out of the ownership; C. J. S., Vol. 26, p. 390, Sec. 106, par. "(d)"; also Devlin on Real Estate, Third Ed., Vol. 2, Secs. 862a and 863.

No Missouri case squarely in point has been found, but we wish to direct your attention to the case of Jackman v. St. Louis & Hannibal R. R. Co., 304 Mo. 319. In this case a railroad company had given a mortgage to secure payment of certain bonds. The mortgage conveyed the following (l. c. 323):

"... the railway of the said parties of the first part now constructed and that may hereafter be constructed from the city of Hannibal in the State of Missouri through the counties of Marion, Ralls, Pike, Lincoln and St. Charles to a connection with the Wabash, St. Louis and Pacific Railway at Gilmore Springs in the County of St. Charles, a distance of eighty-one and three-quarters miles or thereabouts. Together with all and singular the railroad, railways, rails, turn outs and side track bridges, fences, fixtures, buildings, lands for tracks, depots, tenements, appendages and appurtenances owned or hereafter to be acquired by the said parties of the first part; also all railway depots or stations with the buildings and fixtures thereon erected or to be erected together with the shops, machinery and tools, rolling stock and other corporate property incident or appurtenant to its operation, and all the chartered rights, franchises and privileges of said parties of the first part and all the estate, right, title and interest, property claim and demand as well at law as in equity of

the said parties of the first part
to the same and every part and parcel
thereof."

Later the mortgage was foreclosed and the purchaser at the foreclosure reorganized the railroad company as a new corporation. Mary Jackman, a judgment creditor of the company which executed the mortgage, instituted the suit for the purpose of satisfying her judgment out of certain assets of the mortgaging railroad company which had been taken over by the purchaser at the foreclosure sale, which he contended were not covered by the mortgage. From this case we quote at length, beginning on l. c. 326:

"This requires a construction of the expressions, 'appendages and appurtenances,' and property 'appurtenant to its operation.' 'Appurtenance' is defined as an appendage; 'that which belongs to something else.' (4 C. J. 1466.) The United States Supreme Court in *Humphreys v. McKissock*, 140 U. S. 304, l. c. 314, used this language: 'Under the term "appurtenances," as used in the mortgage in question, only such property passes as is indispensable to the use and enjoyment of the franchises of the company. It does not include property acquired simply because it may prove useful to the company and facilitate the discharge of its business. A distinction is made in such case between what is indispensable to the operation of a railway and what would be only convenient. (*Bank v. Tennessee*, 104 U. S. 493-496.)'

"The Liberty bonds were treated by the Railway Company as independent of the mortgage, as liable for the payment of the plaintiff's claim, because they were put up to indemnify a surety of its appeal bond. They certainly are not appurtenances or appendages, nor incident to the operation of the railroad. These bonds have nothing to do with the operation of the railroad and could not be covered by those terms. The same may be said of the fine

October 17, 1945

of \$5000 paid by the Railway Company and released to the Railroad Company after it had acquired the lines of the Railway Company. As to the \$45,000 cash which was turned over to the Railroad Company on the foreclosure of the mortgage, the trial court found that it was not described in the mortgage nor included in the foreclosure decree, nor intended to be transferred. The court found that certain money and other things acquired by the Railroad Company did pass by the foreclosure decree:

| | |
|------------------------------------|------------|
| Sum due from agents and conductors | |
| | \$ 836.77; |
| Materials and supplies on hand | |
| of value of | .9,975.05; |
| Traffic car, bills receivable, | |
| in amount of | 870.61; |
| Miscellaneous Bills Receivable, | |
| and other items | 6,028.22 |

"These items, it was held, were appurtenant to the operation of the property described in the mortgage and passed by the foreclosure decree. But the \$45,000 cash, not included in those items, was properly held by the trial court to be not within the terms of the mortgage. It was not indispensable to the enjoyment of the property, nor to its operation, although it might have been convenient to use in that connection. We hold, therefore, that the three items mentioned were not covered by the mortgage under the designations 'appendages,' 'appurtenances,' or 'appurtenant to its operation.'

"The appellant, however, emphasizes the closing part of the description where, after describing the specific property, rights, franchises, etc., of the mortgagor, it concludes with this expression:

"And all the estate, right, title and interest, property, claim and demand, as well

at law as in equity of the said parties of the first part to the same and to every part and parcel thereof.'

"Appellant spent a great deal of time in its brief in quoting definitions of 'personal property.' 'Personal property' is not mentioned in the description, but 'property' in the clause last quoted, it is argued, includes the very personal property in dispute here; property is so general a term, so inclusive in its significance, that this particular property could not escape.

"This conclusion can be reached only by detaching the clause last quoted from its context. It plainly refers to the property previously mentioned and the particular interest which the mortgagor had in that property. Notice that the word 'property' is associated with 'estate,' 'right,' 'title,' 'interest,' 'claim' and 'demand,' and these words are related to the preceding description by the words 'to the same, and to every part and parcel thereof.' The same what? That, of course, means the things previously enumerated, railroad lines, depots, etc. 'Property' is used there in the same way exactly as 'interest,' 'right' and 'title' are used. It is used in the same sentence and in the same connection and with the same general significance. The appellant seems to claim that because 'property' has a meaning as applied to a specific thing, it may be detached from this context and construed as if it were used separately.

"This is a misconception of the use of the word 'property.' Its primary meaning as defined in Webster's Dictionary is 'the exclusive right to possess, enjoy, and dispose of a thing.' Cyc. gives the primary definition as 'the right and interest which a man has in lands and chattels to the

exclusion of others.' (32 Cyc. 647-648.) The term is applied to the thing itself as a secondary meaning. That was distinctly held by this court in the case of *St. Louis v. Hill*, 116 Mo. l. c. 533, quoting from encyclopaedias and textbooks. A man has an interest and property in a house. He also has the house. When we speak of his property in a house we certainly do not mean the thing itself but his right to it. The primary meaning of the word property was intended in this description in the mortgage. There might be some room for dispute if the word were used alone, but it is used in connection with other words and used in such relation to the specific things, such as railway lease, depots, etc., so that it is not susceptible of any other meaning than in the sense of the 'right' or 'title' 'to' the things described. Therefore, the money and bonds under consideration here are not described in the mortgage, did not pass by the decree, and are subject to the payment of the plaintiff's judgment."

This case, while not squarely in point, does indicate that a conveyance of real property does not carry personal property that is not essential to the enjoyment of the real property granted unless the terms of the conveyances so indicate.

In the matter here under consideration the grantor had owned real property, a tax lien had been foreclosed upon his property, from the proceeds of the foreclosure his tax debts and the costs of the sale had been paid leaving a balance in cash to represent his former interest in the land. In other words, his interest in the land had been converted to personal property, cash, or rather the right to claim the cash from the county treasurer. Ten years after this time he executed a quitclaim deed to the land which had been sold at the tax sale. By this quitclaim deed the grantor conveyed whatever interest he had in the land described, together with all of the rights, privileges and immunities which were essential to the enjoyment of the estate granted. The estate granted amounted to nothing.

October 17, 1945

The right or privilege to claim the surplus from the tax sale might add materially to the enjoyment of the grantee named in the quit claim deed, it is not essential to the use and enjoyment of the estate granted (nothing) and furthermore the deed could not operate to transfer the title to personal property or the right to claim personal property which was not essential to the enjoyment of the estate granted.

Conclusion.

It is, therefore, the conclusion of the Attorney General that the quitclaim deed mentioned in your letter would not operate to transfer the right to claim the surplus arising from the proceeds of the sale of the land at tax sale.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

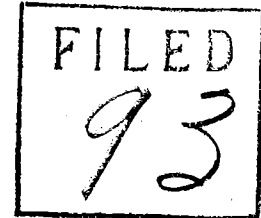
APPROVED:

J. E. TAYLOR
Attorney General

WOJ:EG

OFFICERS: Peace officers have jurisdiction only in districts for which they were appointed or elected.

October 29, 1945



12/3

Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, as follows:

"The streets and highways of St. Louis County cross the limits of incorporated municipalities and the limits of the City of St. Louis at very many points, giving rise to the following questions in the apprehension of law violators:

"1. Where a police officer, deputy sheriff or State patrolman sees an offense committed, whether traffic violation or other offense, to what extent can the officer follow the offender into another jurisdiction, incorporated city or county to apprehend him?

"2. Assuming that the officer has the authority to follow the offender into another jurisdiction to make the arrest, can the officer then bring the offender back into the jurisdiction where the offense was committed to make bond, or must he be turned over to the police in the jurisdiction where arrested?

"For the assistance and advice of the various law enforcement officers in this County, I would deeply appreciate the opinion of your office on these points."

Ordinarily, the authority of any peace officer to make an arrest is confined within the limits of the geographical or political subdivision for which he is elected or appointed. The general rule is set out in 5 C. J., page 422, Sec. 57, as follows:

"When acting within the state as a peace officer without a warrant, or when acting under a warrant directed to him by description of his office, or directed generally to the class of officers to which he belongs, a peace officer may arrest in his official capacity only within the limits of the geographical or political subdivision of the state of which he is an officer, except as otherwise provided by statute."

The above rule has been followed in this state. In *Rodgers v. Schroeder*, 220 Mo. App. 575, we find the following, l. c. 580:

"It is generally held, in the absence of any statute conferring the power, that municipal officers, such as marshals and policemen, have no official power to apprehend offenders beyond the boundaries of their municipalities. * * * The power of such officers to arrest without process for mere quasi-criminal offenses arising from the violation of ordinances is liable to serious abuses, and ought not to be enlarged by judicial construction beyond what is expressly granted or necessarily implied in the statute."

Bearing the above rule in mind, we will consider the powers of the Missouri State Highway Patrol, sheriffs, and police officers, in that order.

A special statute has been enacted to permit members of the State Highway Patrol to pursue offenders against our criminal laws throughout the state. Section 8359, R. S. Mo. 1939, provides:

" * * * When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or

suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken."

By the enactment of this statute, the Legislature clearly recognized the rule first above stated, limiting the powers of a peace officer to his own geographical or political subdivision.

Section 13136, R. S. Mo. 1939, defines the duties of the various sheriffs in the state, in the following language:

"Every sheriff shall be a conservator of the peace within his county, and shall cause all offenders against law, in his view, to enter into recognizance, with security, to keep the peace and to appear at the next term of the circuit court of the county, and to commit to jail in case of failure to give such recognizance. In any emergency the sheriff shall appoint sworn deputies, who shall be residents of the county, possessing all the qualifications of sheriff. Such deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury. (Emphasis ours.)

There is also a special provision concerning the sheriff of the city of St. Louis, which is found in Section 15665, R. S. Mo. 1939, as follows:

"The sheriff of the city of St. Louis shall do and perform all acts and duties prescribed by general and special laws applicable to the sheriff of St. Louis county, which were in

October 29, 1945

force at the time of the adoption of the scheme and charter, except in such cases as are inconsistent with some provisions of said scheme and charter."

Your question concerns deputy sheriffs, and they would naturally have the same powers as a sheriff, under Section 13134, R. S. Mo. 1939, which is as follows:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

Your question concerning police officers requires a discussion of the powers of such officers in the various classes of cities in the state.

The powers of the police in the city of St. Louis are discussed at length in State ex rel. v. Stobie, 194 Mo. 14. Among the powers granted at that time was the following:

" * * * In case they shall have reason to believe that any person within said city intends to commit any breach of the peace, or violation of law or order beyond the city limits, any person charged with the commission of crime in the city of St. Louis, and against whom criminal process shall have issued, may be arrested upon the same in any part of this State by the police force created or authorized by this act."

The question arose in this case as to whether the police were empowered to arrest offenders against state laws in St. Louis county, and the Supreme Court, in limiting their powers to the city of St. Louis proper, stated, l. c. 61:

"While the metropolitan police system was created by the State through its General Assembly, it was created for the city. The city and county of St. Louis, by the express provisions of the Scheme and Charter, were made separate, distinct and independent municipalities, and unless we are to absolutely ignore all the principles of local self-government, which has ever been the pride of this great Commonwealth, it must be held under the

law now in force, that as police officers, relators were without authority to arrest offenders in St. Louis county for offenses committed in such county."

The general powers of police officers in cities of over 500,000 inhabitants are to be found in Section 7691, R. S. Mo. 1939. Their power to arrest without process, and their jurisdiction, is confined to the city.

Police officers in cities of the first class derive their powers from Section 6495, R. S. Mo. 1939, which is as follows:

"The members of the police force of such city, organized and appointed by the police commissioners of said city under this article, are hereby declared to be officers of such city, under the charter and ordinances of such city, and also to be officers of the state of Missouri, and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state or the ordinances of said city."

While the above section designates policeman in cities of the first class to be state officers, this was obviously done in order that said policemen might make arrests in proper cases for violation of state laws within the city. This is clearly true because of Section 6497, R. S. Mo. 1939, which specifically empowers the police in cities of the first class to enforce ordinances of the city within public parks or grounds belonging to the city but located outside the city limits.

Police in cities of the second class derive their powers from Section 6664, R. S. Mo. 1939, which relates to the powers of the chief of police. That section provides, in part, as follows:

" * * * He shall have like power with the sheriff of the county to execute the writ of search warrant. He shall be active in quieting riots, disorders and disturbances of the peace within the limits of the city, and shall take into custody all persons so offending against the peace of the city, * * *; and in

the prosecution and suppression of crime and arrest of offenders he shall have, possess and exercise like power, authority and jurisdiction as the sheriff of the county, under the laws of the state. * * *

While the latter part of this section may be ambiguous, the phrase "within the limits of the city" and the further phrase "against the peace of the city" clearly indicate an intention to limit the powers of the police to the limits of the city itself.

The powers and duties of police officers in cities of the third class are derived from Sections 6898 and 6902, R. S. Mo. 1939, but their authority is limited to the city within which they serve. See *Rodgers v. Schroeder*, supra.

The same is true of the police and marshals in cities of the fourth class, who derive their powers from Section 7125, R. S. Mo. 1939.

The constable or marshal of a town or village, appointed under Section 7253, R. S. Mo. 1939, is granted the same powers as the constable of his township. Section 7253 is as follows:

"The constable or marshal appointed by the trustees of the inhabitants of such towns, giving bond and ample security for the performance of his duties, is hereby authorized to execute orders and process, arising under the ordinances of said town, and who, within the corporate limits of said town, shall have concurrent power with the constable of the municipal township in which said town is situated to execute all orders, notices, writs and other process and duties that may be executed by the constable of said township, with like effect, and shall receive the same fees therefor."

All of the foregoing questions have been discussed from the view that the officer concerned was not in possession of a warrant of any kind for the arrest of the offender, as your request clearly does not include such a case. We have not discussed the rights of private citizens to arrest for offenses, since your question concerns only officers in their official capacities.

With regard to your second question, it is obvious that only members of the State Highway Patrol may follow an offender

October 29, 1945

into another jurisdiction, and Section 8360, R. S. Mo. 1939, plainly discusses the disposition of the offender in such a case. That section is as follows:

"Any person arrested by a member of the patrol shall forthwith be taken by such member before the court or magistrate having jurisdiction of the crime whereof such person so arrested is charged there to be dealt with according to law."

CONCLUSION

It is our conclusion, therefore, that except for members of the State Highway Patrol, who are specially authorized by statute to pursue criminals throughout the state, peace officers generally are limited in their official powers to the geographical or political subdivisions for which they were appointed or elected, where they are not acting under legal process.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

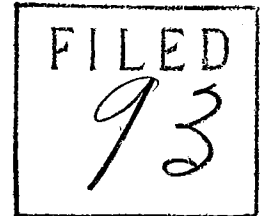
RIH:HR

W. P. Smith

COUNTY COURT DRAINAGE DISTRICTS: 1) The County Court has no authority to employ attorneys to resist the collection of taxes levied by such County Court against property in a County Court Drainage District. 2) The County Collector may employ an attorney to collect delinquent drainage tax at the fees to be allowed by the Circuit Court, as compensation, under Section 12417, R.S. Mo. 1939.

December 6, 1945

12-17



Honorable Henry C. Walker
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. Walker:

Your letter requesting an opinion, concerning the affairs of Drainage District No. 4 of Dunklin County, has been received.

Your letter states:

"The County Court instructed me to request an opinion from you in the following points in reference to Drainage District No. 4.

"At the time D. D. No. 4 was organized the benefits assessed were \$20,000 less than the amount of the bonds issued. The County Court later levied additional assessments to pay off the surplus of the bonds. The Supreme Court of Missouri later held said additional assessment and levy invalid. After said decision by said Supreme Court, the owner of the bonds obtained judgment in the United States District Court against D.D. No. 4 for the additional amount due on said bonds. Said U. S. Court later issued a writ of mandamus ordering the County Court to levy a tax to pay off said additional bonds. Said levy was made in 1941. \$1800 has been collected on said levy.

Dec. 6, 1945

"In 1938 the County Court entered into a contract of employment on behalf of D.D. #4 with three attorneys to represent the District and the landowners in any action brought by the bond holders or county Collector to enforce the payment of said taxes; and agreed to pay them \$3000, if they were successful in defeating the payment of said taxes. A copy of this contract is enclosed. I will number this contract, 'Contract No. 1.'

"The Treasurer and Ex-officio Collector of this county filed a petition, a copy of this petition is enclosed at this term of the County Court, with the County Court asking that an attorney be employed to represent him in bringing a suit to enforce the collection of the delinquent taxes in D.D. #4. The Court is requested to enter into a contract on behalf of D.D. #4, whereby they employ an attorney to bring suit against one land owner for the collection of his delinquent taxes in D.D. #4, paying said attorney \$750 for bringing said suit, and pay him \$1250 additional if he wins it. A copy of said petition and contract is enclosed. I will number this contract, 'Contract No. 2'.

"The County Court wants to know the following points:

"1. (a) Is contract No. 1 valid and binding on Drainage District No. 4 and Dunklin County; and does the County Court have the power and authority to enter into such contract. (b) If said contract is valid and binding, and the County Court has this authority, and the attorneys employed are

successful in defeating the collection of said Drainage taxes, where and how shall the Court or Drainage District obtain the funds with which to pay the \$3000 they will then owe said attorneys?

"2. (a) Does the County Court have the right and authority to enter into contract No. 2 on behalf of said Drainage District, and pay more than the fees allowed by statute for suing and collecting delinquent Drainage taxes? (b) If it is held that the Court does have this right and authority, from what funds may they legally pay said attorney fee, and how shall said funds be obtained?

"I am enclosing certain memorandum furnished me by the attorney interested in contract No. 2."

Section 12433, gives the County Court of your County the same control over the affairs of said Drainage District No. 4, as it does over County business.

In giving effect to Section 12433, R.S. Mo. 1939, our Springfield Court of Appeals in the case of Drainage District vs. Hetlage, et al., 102 S.W. (2d) 702, 1.c. 708, in a decision construing said Section, with respect to serving processes on a Drainage District, and in holding that the County Court has the exclusive control and management of Drainage Districts, organized under County Courts, said:

"In other words, the county court, as a court, manages such county court drainage districts in the same manner as it manages the affairs of the county.
* * * ."

The County Court of Dunklin County has no duty to perform in, nor may it exercise the privilege of, entering into a contract for or on behalf of such Drainage

District for the purpose of providing funds or taking any part whatsoever, in the defense against the prosecution of suits to collect the drainage tax levied and assessed against property located in said Drainage District at the direction of the Federal Courts. The right or privilege of resisting the collection of such taxes is the private right alone of the individual persons who are the owners of property in said Drainage District. It is not a right of the Drainage District itself, as such, and the County Court as manager of the Drainage District is not concerned, nor is the Drainage District, in the defense of such tax suits. The County Court of Dunklin County has no lawful authority or right to enter into a contract as manager of said Drainage District for the benefit of private individuals who are the owners of the property assessed with such tax. This is so because the Constitution of this State forbids such action by any of the public bodies of the State. Such public bodies as the Legislature, County Courts, municipalities and other public corporations, may not appropriate public funds derived from any source whatever to the aid or benefit of any private person. Section 38 (a), Article III of the new Constitution of Missouri so declaring, is as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation * * *."

Section 25 of Article VI of the new Constitution is as follows:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department

Dec. 6, 1945

and the widows and minor children of the deceased members, and may authorize any city of more than 100,000 inhabitants to provide for the pensioning of other employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

The above quoted provisions of the Constitution would prohibit the appropriation by any sub-division of the State of any public funds for any private purpose, and, we believe, would prohibit the County Court of Dunklin County from entering into a contract, the effect and result of which would eventuate in lending the public credit and the grant of public funds to individuals.

The rule of law in support of the terms of our Constitution above quoted is stated in 15 C.J., page 590, as follows:

"The constitutions of several states either have prohibited, or do prohibit, counties from giving any money or property, or loaning its credit, to or in aid of any corporation, association, or individual, or from becoming a stockholder, either directly or indirectly, in any joint stock company, corporation, or association. Such prohibitions apply only to aid to individuals, associations, companies, and corporations engaged in purely private enterprises, or enterprises only quasi public; * * *".

In construing the same provisions in the Constitution of Missouri of 1875, which was in almost the identical language of Section 38 (a) of our present Constitution,

supra, our Supreme Court in the case of Kavanaugh vs. Gordon, 244 Mo. 695, l.c. 722, said:

"Furthermore there can be no two ways about it that it is special legislation of an undisguised and typical kind, granting a special or exclusive right or privilege to an individual, Nolen, in violation of Par. 26, Sec. 53, of Art. 4 of the Constitution, supra. Special legislation is that made for an individual as distinguished from a class, precisely as here. (State ex rel. v. Gordon, 236 Mo. l.c. 162, et seq.)"

In the case of State ex rel. vs. Kimmel, 256 Mo. 611, l.c. 639, again construing such terms of the Constitution of 1875, our Supreme Court said:

"In the next place, it is in the teeth of section 46, article 4, of the constitution, which, barring the one instance of 'a case of public calamity,' denies to the General Assembly the power to make any grant or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever. * * *".

In the case of Elsberry Drainage District vs. Harris et al., 267 Mo. 139, the Supreme Court had before it a case bringing the above quoted terms of the Constitution of 1875 strictly to the action of Drainage Districts, holding that they are included in the public bodies prohibited from engaging in any activities, including the levying of taxes for a private enterprise. The Court, l.c. 161, 162, said:

"* * * The drainage district in these respects are agencies of

the State, and it is not necessary to say that they have no more power to levy a tax to aid a purely private enterprise than would the State itself. The very fact that they are clothed with these extraordinary powers imposes upon the courts in the exercise of their jurisdiction, the duty of watchfulness to see that such powers are not prostituted to the purposes of private speculation. * * * ".

Section 25, Article VI of the new Constitution, supra, prohibits any and all subdivisions of the State from lending credit or granting public funds to an individual with the same purpose and effect in like manner as Section 38 (a), Article III, of the new Constitution, supra, prohibits the Legislature from passing laws for such purposes.

We believe the above cited authorities conclusively prohibit the County Court of Dunklin County from entering into said contract designated No. 1.

Section 12416 of Article 3, Chapter 79, R.S. Mo. 1939, requires the County Collector to collect the drainage taxes assessed and levied by the County Court. That part of said Section 12416, so providing, is as follows:

"It shall be the duty of the collector of revenue of each county in which lands or other property of any drainage district organized under this article are situate, to receive the 'drainage tax book' each year and he is hereby empowered and it shall be his duty to promptly and faithfully collect the tax therein set out and to exercise all due diligence in so doing. * * * ".

The letter of explanation accompanying the request for an opinion on this matter recites that said Drainage District now has on hand the sum of \$1,800, paid as taxes

by various persons in response to the levy to make up the deficiency for the payment of the difference between the benefits and the amount of the bonds which were sold, under the writ of mandamus issued by the United States District Court, and affirmed by the United States Circuit Court of Appeals. It is said that the Collector of Dunklin County, has been advised that said sum of \$1,800, may be appropriated as part payment of an attorney's fee in the prosecution of said tax suits. We believe said \$1,800 may not be used for such purpose.

Section 12418, Article 3, Chapter 79, R.S. Mo. 1939, governing County Court Drainage Districts, wherein said Section providing for the payment of bonds of the Drainage District from the taxes levied and assessed against the property in said district, states:

"* * * The proceeds of any taxes so appropriated shall be used for the purpose of paying the principal and interest of said bonds and no other.
* * * "

We do believe that the County Collector may employ an attorney to file and prosecute the suits to collect the said delinquent drainage tax, but he may only be compensated as provided in Section 12417, R.S. Mo. 1939.

Section 12417, R.S. Mo. 1939, provides that the Circuit Court may allow a reasonable attorney's fee in such cases.

That part of said Section 12417, providing the allowance of an attorney's fee in such cases is as follows:

"All drainage taxes provided for in this article, including maintenance taxes, together with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee to be fixed by the court and taxed as costs in the action brought to enforce payment, shall from date of the levying of the same by the county court as provided herein, until paid, constitute a lien, to which only the lien of the state

Dec. 6, 1945

for state, county, school and road taxes shall be paramount, upon all of the lands assessed, and shall be collected, in the same manner as state, county and school taxes upon real estate are collected. * * *

The attorney's fee when allowed by the Court constitutes, along with other costs, a lien upon the lands assessed for the original tax. This provision makes absolutely secure the fee of the attorney for the Collector when the same is allowed by the Circuit Court in such cases. This is the method pointed out by the statutes of this State for the employment of an attorney and providing the means of his compensation, and it must be followed, we believe.

With the certainty of the fee allowed by the Court being paid as costs in any such case by reason of the lien created by the statutes, we believe the County Court or the Collector will have no great difficulty in employing counsel in such cases, who would be allowed to collect for his compensation the fee allowed by the Circuit Court in each case.

CONCLUSION.

1) It is, therefore, the opinion of this Department that said contract No. 1 is invalid and not binding upon Drainage District #4 in Dunklin County, Missouri, because the County Court as manager of such Drainage District, is prohibited by our Constitution from entering into such a contract since the effect and result of such contract would be to lend the public credit and grant public funds to private individuals.

2) It is the further opinion of this Department that the County Collector of Dunklin County, may enter into a contract for the employment of counsel to collect

Honorable Henry C. Walker

-10-

Dec. 6, 1945

delinquent drainage district taxes, the compensation to be paid such attorney to be the fee allowed by the Circuit Court as costs in any such suit as is provided in Section 12417, R.S. Mo. 1939.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

W. O. JACKSON
(Acting) Attorney General

GWC:ir

COUNTY POLITICAL PARTY COMMITTEE:

A majority of the county committee, when duly called and acting, has right to transact all business for entire body.
When committee fails to have quorum, any action except that of adjournment is not binding.

January 8, 1945



Honorable Sam M. Wear
State Chairman
Democratic State Committee of Missouri
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this department, which request reads as follows:

"Enclosed find a communication which I have just received from George J. Sick, Chairman of the St. Louis County Democratic Committee, relative to a situation which has arisen in his county committee concerning which he requests an opinion of your department.

"I will be deeply grateful if you will look into these two questions and let me have your opinion regarding same at the earliest possible moment.

"I also will appreciate it if you will forward a copy of your opinion directly to Mr. Sick at 557 Ridge Avenue, Webster Groves, and also send a copy to me at State Headquarters here."

(The letter above referred to is attached and marked Exhibit A.)

Our courts have had very little to do in controversies connected with the functions of political committees. It is my understanding that the St. Louis County Committee has no by-laws, rules or regulations adopted. However, the rule seems to be that, unless there be some specific law to the contrary, a majority of a given body has the right to transact all business which the entire body is authorized

January 8, 1945

to do and a majority vote of those present and voting (there being a majority participating) can do all the things which could be done by the entire body. This was the common law rule and is changed only by some express provision. The theory is that the majority is the body itself for the transaction of business, and inasmuch as the statutes of this State have not prescribed what number shall constitute a quorum for the transaction of business by this committee, the common law fixes a quorum of such committee at a majority of its members. Such quorum has the full power of the whole committee, and for the purposes of transacting business is in law the committee itself, and if in the transaction of any business a majority of that quorum votes for a measure such measure is as valid and binding as if adopted by the entire vote of the committee.

In this connection we are guided by what the court had to say in the case of State ex rel. v. Riechmann, 239 Mo. 81, l.c. 94-95:

"Nor in our judgment does the statute contemplate a two-year undeterminable tenure by the officers of the committee.
* * * * *

" * * * * The law making power had no desire to strip party committees of all the power formerly possessed by them, but only of such powers as would best subserve the public interest in honest primaries and elections. Such political committee ought to have the right to change its officers. The political work of such committee might be stifled by unruly officials. The statute never contemplated that if the committee concluded that a mistake from a party standpoint had been made in the selection of a certain officer, such mistake could not be reached by the proper action of the committee. In other words, these laws were not intended to prevent party committees from doing active and efficient service for their respective parties, and to that end have officers thoroughly in harmony with the majority of such committees, but such laws were enacted solely for the purpose of securing, through the good offices of the State, absolute fairness and honesty in the selection of committeemen and in the action of the committee in so far as it came in contact with the State's election officials and machinery. * * * * "

January 8, 1945

With reference to the second question in Mr. Sick's letter, it appears that after a vote to declare the seats of chairman and vice-chairman vacant, which apparently carried, the offices of chairman and vice-chairman were vacated by this order of business. Then it appears that four of the members present walked out and refused to participate further in the meeting. This brought about a failure to have a quorum present (a majority of the committee), and under such circumstances we follow the rule which is stated clearly in Robert's Rules of Order, p. 135:

"Whenever during the meeting there is found not to be a quorum present, the only thing to be done is to adjourn; though, if no question is raised by it, the debate can be continued, but no vote taken, except to adjourn."

It is, therefore, the opinion of this department that when the meeting of November 20, 1944 adjourned at the time the committee failed to have a quorum any action taken after that is void and not binding; that no officers can be elected until there is a proper call for a meeting for the purpose of electing officers at which meeting a quorum appears and a majority of that quorum votes for the new officers.

May I suggest that you, as State Chairman, call a meeting and see that all the members of the St. Louis County Committee hold a meeting for the specific purpose of electing officers, adopting by-laws and promoting harmony.

Yours sincerely,

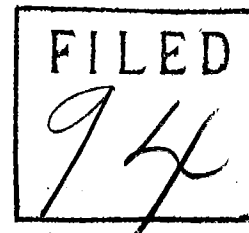
Roy McKittrick
Attorney General

RMCK:ml
BEC
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ACCOUNTANCY: Right of person not registered as public accountant or certified public accountant to make out state and federal income tax returns.

February 13, 1945

219



Missouri State Board of Accountancy
Room 1405 Ambassador Building
St. Louis 1, Missouri

Attention: Mr. R. S. Warner, Secretary

Gentlemen;

We are in receipt of your request for an official opinion under date of January 12, 1945, which request reads:

"A question has arisen before this Board as to whether a person not duly registered as a public accountant or a certified public account, pursuant to the provision of Sections 14905 to 14911t, inclusive of the Revised Statutes of Missouri, 1939, may lawfully engage in the preparation of federal and state income tax returns for taxpayers in Missouri. It is well known that there are many persons operating in such manner at the present time who are holding themselves out to the public as income tax experts and who are accepting fees for services of this nature. The question therefore arises whether the accountancy laws would be violated by such actions on the part of non-registered accountants.

"The attention of the Board has been directed to the wording of Section 14911a (d) wherein it speaks of the preparation of reports.....'to be filed with a court of law, or with any other governmental agency, or are to be exhibited to or circulated among third persons for any purpose.' In your opinion, does this sub-section embrace the preparations of tax returns as

February 13, 1945

an activity falling within the scope of public accountancy as defined in the Act? May we have your opinion on this question?"

An answer to your request requires consideration of the act passed by the 62nd General Assembly, found on pages 955 to 970, inclusive, Laws 1943, repealing Chapter 115, Revised Statutes 1939. We especially would like to refer to Section 14911-a, subdivision (d), which reads:

"A person shall be deemed to be in practice as a public accountant, within the meaning and intent of this Act:

* * * * *

"(d) Who prepares or certifies for clients reports of audits, balance sheets, and other financial, accounting and related schedules, exhibits, statements or reports, which are to be used for publication or for credit purposes, or are to be filed with a court of law, or with any other governmental agency, or are to be exhibited to or circulated among third persons for any purpose.

"Provided: That nothing contained in this Act shall apply to any person who may be employed by one or more persons, firms or corporations for the purpose of keeping books, making trial balances or statements or preparing reports, provided such reports are not used or issued by the employer or employers as having been prepared by a public accountant."

The primary rule of statutory construction is to ascertain and give effect to the legislative intent. In *Wallace v. Woods*, 102 S.W. (2d) 91, 1.c. 95, 340 Mo. 452, the court said:

"The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to

promote its object, and "the manifest purpose of the statute, considered historically," is properly given consideration. * * * "

The question is, in Section 14911-a, subdivision (d), what do the following words mean: "or are to be filed with a court of law, or with any other governmental agency"? Does the reference to "any other governmental agency" mean such agencies as the State Auditor and the Department of Internal Revenue, or does the said words refer to other agencies comparable with courts of law such as Public Service Commission, Workmen's Compensation Commission and possibly the Unemployment Commission? We are inclined to agree with the latter conclusion.

There is a very well established rule of statutory construction known as "ejusdem generis," which means that when general words in a statute follow particular words the general words will be considered as applicable only to persons or things of the same general character or class and cannot include wholly different things. In *McClaren v. G. S. Robins & Co.*, 162 S.W. (2d) 856, 1.e. 857, 858, the court, in a very careful discussion of the foregoing rule, said:

"The appellant contends that it was negligence for the respondent to have sold carbon tetrachloride to the Combustion Engineering Company without the word 'poison' thereon, because respondent violated 'section 184, chapter 38, Illinois Revised Statute 1937,' which reads as follows:

"'Every druggist or other person who shall sell and deliver any arsenic, strychnine, corrosive sublimate, prussic acid or other substance * * usually denominated as poisonous, without having the word "poison" * * * shall be fined not exceeding \$25.'

"Carbon tetrachloride is not found in the above section, but appellant contends that it comes within the phrase 'other substance * * usually denominated as poisonous.' The ejusdem generis rule is that where a statute contains general words only, such general words are to receive a general construction, but, where it enumerates particular

classes or things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified. *Keane v. Strodman*, 323 Mo. 161, 18 S.W. 2d 896; *Mangelsdorf v. Pennsylvania Fire Insurance Company*, 224 Mo. App. 265, 26 S.W. 2d 818; *Puritan Pharmaceutical Company v. Pennsylvania Railroad Company*, 230 Mo. App. 848, 77 S.W. 2d 508.

"A case similar to the case at bar is the case of the *Pure Oil Company v. Gear*, 183 Okl. 489, 83 P. 2d 389, loc. cit. 395. That case was an action for damages on account of cattle being poisoned by drinking salt water from an oil well. The Oklahoma Supreme Court, in ruling the case, said:

" 'Also, under the rule of *ejusdem generis*, salt water and other deleterious substances coming from the production of oil and gas wells cannot be considered as "other poison" similar to strychnine, and by reason of this canon of construction, Sec. 2440, 21 Okl. St. Ann. Sec. 1197, *supra*, cannot be made applicable here.'

"Before the phrase 'or other substance * * * usually denominated as poisonous' can be construed to include carbon tetrachloride, we must be able to say that it is like some one of the species and kinds of poisons expressly mentioned in the statute. This we cannot do, for we think carbon tetrachloride contains no single element of the various poisons enumerated by the statute. Obviously, carbon tetrachloride is not a drug, but a grease solvent sold commercially as a cleaning fluid, and is not the same kind or class as the substances mentioned in the Illinois statute. The poisons mentioned in that statute are of such character and universally so dispensed as to require a warning of their poisonous nature if taken internally, in order to prevent a purchaser, or other person into whose hands the drug may come, from

taking the same internally by mistake and to guard against overdoses of such thereof as may be prescribed for medicinal purposes, either alone in minute quantities or as an ingredient of a medicinal preparation."

Likewise, in *Wood v. Imperial Irr. Dist.*, 17 Pac. (2d) 128 1.c. 130, 216 Calif. 748, the court held that words "or other political subdivisions" following words "state, or any county, city and county, city, town, municipality," excluded irrigation districts.

In *Hammett v. Kansas City*, 173 S.W. (2d) 70, 1.c. 75, 351 Mo. 192, the court said;

" * * * 'The ejusdem generis rule is that where a statute contains general words only, such general words are to receive a general construction, but, where it enumerates particular classes or things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified.'"

We are unable to find wherein the courts of this state have ever construed the provision "court of law," however there are several decisions in other states construing such provision. Ordinarily when such a term is used it usually refers to a court established for the purpose of having disputes litigated, question of facts presented and all rights of parties to said litigation determined. One of the most recent cases defining "court of law" is the case of *David L. Moss Co. v. United States*, 103 F. 2d 395, 1.c. 397, wherein the court construing the words "court of law" held that a Customs Court is a court of law, in that it is a tribunal established by Congress to the exclusion of all other courts for the purpose of correcting any errors in the administration of customs laws. In so holding the court said;

"It is true, as pointed out by counsel for the Government, that the Customs Court is given no direct right of review over action of the Tariff Commission. This does not mean, however, that it is without power to consider the legality of increase of duties resulting from the

Commission's action. The court is a court of law, and it is granted full power to relieve against illegality in the assessment or collection of duties. 19 U.S.C.A. Sec. 1515, 1518. If relief may not be had before it against illegal action under the flexible tariff provisions, relief may not be had anywhere; for its jurisdiction in such matters is exclusive. It is the tribunal established by Congress in the provision of a complete system of corrective justice for the administration of the customs laws, and questions involving the validity of official action in the imposition and collection of duties are properly cognizable before it to the exclusion of other courts. *Cottman Co. v. Dailey*, 4 Cir., 94 F. 2d 85, 88; *Riccomini v. United States*, 9 Cir., 69 F. 2d 480, 484; *Gulbenkian v. United States*, 2 Cir., 186 F. 133, 135; *Nicholl v. United States*, 7 Wall. 122, 130, 19 L. Ed. 125.
* * * *

"Governmental agency" has been defined by the courts of the land as including almost every kind of a department of city, state and federal government, such as Fire Departments of a municipality, Road Commissions, Irrigation Districts, Municipal Corporations, Regional Agricultural Credit Corporation created by the Reconstruction Finance Corporation, and Tennessee Valley Authority. We also think that state and federal agencies comparable to courts of law would likewise be considered governmental agencies.

Therefore, it is the opinion of this department that the rule of *ejusdem generis* is applicable in construing the provision herein above quoted in Section 14911-a, subdivision (d), and applying such rule we must conclude that the intent of the Legislature in passing such law was that it should apply to only such reports, audits, schedules, statements, etc., as are to be filed in courts of law or other governmental agencies comparable to other courts of law. Such provision does not prevent persons that are not registered as public accountants or certified public accountants, under the Accountancy Act of 1943, from preparing state and federal income tax returns.

Furthermore, in view of the last proviso in subdivision (d) of Section 14911-a, *supra*, we doubt if such filing would prevent any one not registered under the act from preparing income taxes even if the foregoing provision

February 13, 1945

in Section 14911-a, subdivision (d), should be construed to include agencies where said income tax returns are filed, provided said reports, etc., are not held out as being prepared by a public accountant.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

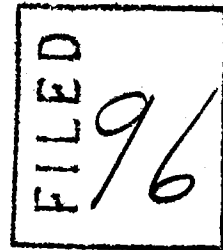
HARRY H. KAY
(Acting) Attorney General

ARH:ml

CRIMINAL LAW: Discussion of sentences to Intermediate Reformatory and transfer to Penitentiary.

May 31, 1945

6/5



Honorable Thomas E. Whitecotton
Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Warden Whitecotton:

The Attorney General wishes to acknowledge receipt of your letter of May 28, 1945, in which you make the following request for an opinion:

"Frequently we receive at the Missouri State Penitentiary men under the age of twenty-five years without serious previous criminal histories and who, it would appear from a penological and social point of view, should be incarcerated at the Intermediate Reformatory. However, we are not clear on some points of the law pertaining to transfers from the penitentiary to the reformatory. Would you, therefore, give us your opinion relative to such transfers?

"The following are examples of two problems with which we are now confronted: A boy is sentenced to the Intermediate Reformatory for two years for stealing an automobile, and at the same time is sentenced to five years to the Missouri State Penitentiary for stealing an automobile, the latter sentence to begin at the expiration of the former sentence. The boy has a good record at the reformatory and will not be nineteen years of age until October, 1945.

"Quite frequently we receive boys seventeen, eighteen and nineteen years of age who, as juveniles, have been at Missouri Training School or similar institutions in other states. There seems to be some division of opinion as to whether or not incarceration as a juvenile would be recognized as a felony conviction.

"It is in such instances as the above that we need your opinion in order to be guided properly in making decisions relative to the transfer to Missouri Intermediate Reformatory of young men who have been sentenced to Missouri State Penitentiary."

The solution of your questions is a matter of statutory construction and application. Due to the fact that the Intermediate Reformatory was established many years after the Penitentiary and that the statutes pertaining to the Reformatory were not as carefully drawn as they might have been, some exceedingly difficult questions can arise in connection with the interpretation and application of these statutes. The laws relating to the Intermediate Reformatory are found in Article 6, Chapter 48, R. S. Mo. 1939. Section 9103 provides for the establishment of the institution, and Section 9117 provides who may be sentenced to it. This section is as follows:

"(9117) If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term proscribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials in charge of said reformatory to receive all such convicted persons."

May 31, 1945

Also important in considering your questions is Section 8998, R. S. Mo. 1939, relating to the Missouri Training School for Boys, which section provided:

"Any person under the age of seventeen years, convicted of a crime, the punishment of which, under the statutes of this state, when committed by persons over the age of seventeen years, is imprisonment in the penitentiary for a term of not less than ten years, may be punished in the same manner and to the same extent as provided by the statutes for the punishment of persons over the age of seventeen, or, if a boy, he may be imprisoned in the penitentiary or committed to the Missouri Training School for Boys; and any boy under the age of seventeen years convicted of any other felony, either upon plea of guilty or upon trial, may be committed to the Missouri Training School for Boys. Any boy under the age of seventeen years convicted of a misdemeanor in any court of record, either upon the plea of guilty or upon trial, may, in the discretion of the court, be committed to the Missouri Training School for Boys. No boy under seventeen years of age convicted of a felony shall hereafter be committed to the county jail as a punishment for such offense. Any court having a criminal jurisdiction, in which any male person, between seventeen and twenty-five years of age, shall, upon a plea of guilty, or by the verdict of a jury, be convicted of a felony, and his punishment assessed at imprisonment in the penitentiary, may, in its discretion, at the same term at which such plea of guilty is entered or conviction occurs, and before such person is transferred to the penitentiary, commute the punishment to confinement in the Missouri intermediate reformatory for such term as the court may deem proper, but not for a longer time than that fixed in the sentence to the penitentiary; but such court shall first ascertain and determine that said conviction or plea of guilty is the first conviction or plea of guilty of such person for a felony, and that the

previous conduct, habits and associations of the person so convicted or pleading guilty warrant such commutation."

This last section originally related to what is now the Missouri Training School for Boys, but was amended after the construction of the Intermediate Reformatory, with regard to persons between seventeen and twenty-five years of age.

Section 9118, R. S. Mo. 1939, authorized the transfer of persons from the Missouri Reformatory (now Missouri Training School for Boys) and the Penitentiary to the Intermediate Reformatory. This section is as follows:

"Transfers may be made under the following conditions:

"a. As soon as the construction of the intermediate reformatory is to be undertaken, or as soon as its agricultural or industrial activities require laborers, the commissioners of the department of penal institutions shall have power, with the consent of the governor to transfer to the tract of land upon which the intermediate reformatory is to be located any or all inmates of the Missouri reformatory at Boonville and of the Missouri penitentiary, who at the time of their last conviction were between the ages of seventeen (17) and twenty-five (25) years and who are serving their first sentence for conviction of a felony. The number of convicts thus to be transferred at any time is to be limited to the number that can be properly housed, guarded and cared for and that can be employed efficiently, and economically in the construction and operation or maintenance of the intermediate reformatory. In so far as practicable the construction of the intermediate reformatory shall be carried on by means of the labor of such offenders eligible to admission to it. In making such transfers as are herein authorized preference shall be given to those inmates of the Missouri reformatory at Boonville and who are eligible to transfer to the intermediate reformatory. In making the transfer of inmates of the Missouri penitentiary who are eligible to

transfer to the intermediate reformatory preference shall be given to the younger ones and those who for good reason are most worthy or in need of such a transfer.

"b. The department of penal institutions shall have the power, with the consent of the governor, to transfer to the penitentiary any prisoner who subsequent to his committal to the intermediate reformatory, shall be shown to their satisfaction to have been, at the time of his conviction, twenty-five years of age or over, or to have been previously convicted of a felony; and may also transfer any apparently incorrigible prisoner, whose presence in the reformatory appears to be seriously detrimental to the well-being of the inmates of the institution. And the superintendent may, by written requisition, request the return to the intermediate reformatory of any person who may have been so transferred subject to the approval of the commissioners. Each person so transferred to the penitentiary shall be held therein, and subject to all rules and discipline thereof until he becomes eligible for release, according to the rules adopted for the penitentiary, unless recalled to the reformatory, as herein provided, by the department of penal institutions. And it shall be the duty of the warden of the penitentiary to receive such prisoners as may be transferred to him, and properly care for them till such time as their return may be asked for or until the time of their official release from said penitentiary; it is further provided, that if in any case it shall be found by the department of penal institutions and the governor of this state, that a prisoner confined in the Missouri penitentiary or the Missouri reformatory at Boonville, has been improperly sentenced to either of these institutions, and that such prisoner should have been sentenced to the intermediate reformatory, such prisoner may, with the consent

May 31, 1945

of the governor, be transferred to the intermediate reformatory, to be and become an inmate therein, subject to the rules and discipline of such reformatory; and it shall be the duty of the general superintendent of said reformatory to receive such prisoner into said reformatory as may be so transferred, and properly care for such prisoner therein until such time as such prisoner may be lawfully paroled or discharged therefrom. In like manner, transfers may be made from the Missouri reformatory at Boonville to the intermediate reformatory of any offender who, subsequent to his commitment, shall be shown to their satisfaction to have been, at the time of his conviction seventeen years or more of age, but less than twenty-five and for the first time convicted of a felony. In case of any transfers herein set forth the convict is not to remain under the custody of the department of penal institutions for a longer time than that fixed in the original sentence."

Each of these sections requires that persons sentenced or transferred to the Intermediate Reformatory be serving sentence under a first conviction. Under this situation of the law, in the first example you use, the second sentence could not have been to the Intermediate Reformatory even though the boy is within the proper age group to be sentenced to the Intermediate Reformatory.

In regard to the second matter, a judgment finding a juvenile to be a delinquent is not a conviction of an offense and should never be so considered. The laws relating to juvenile delinquency are found in Articles 9 and 10, Chapter 56, R. S. Mo. 1939, article 9 treating the matter in counties of 50,000 inhabitants and over, and article 10 pertaining to counties under 50,000 inhabitants. In each of these articles is found a definition of a delinquent child. Section 9673, Article 9, Chapter 56, defines a delinquent as follows:

"* * * The words 'delinquent child' shall include any child under the age of seventeen (17) years who violates any law of this state, or any city or village ordinance,

or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly visits or enters a house of ill-repute; or who knowingly patronizes or visits any policy shop or place where any gaming device is or shall be operated; or who patronizes or visits any saloon or dramhouse where intoxicating liquors are sold; or who patronize or visits any public pool room or bucket shop; or who habitually wanders about the street in the nighttime without being on lawful business or occupation; or who habitually wanders about the streets or roads or public places during school hours without being on any lawful business or occupation; or who habitually wanders about any railroad yards or tracks, or jumps or who habitually hooks on to any train, or enters any car or engine without lawful authority, or who is either habitually truant from any day school, or who, while in attendance at any school, is incorrigible, vicious or immoral; or who habitually uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct in any public place or about any schoolhouse; or who habitually and willfully, and without the consent of its parents, guardian, or other person having legal custody and control of such child, absents itself from home and remains away at night, or loiters and sleeps in alleys, cellars, wagons, buildings, lots or other exposed places. * * *

And Section 9698, Article 10, Chapter 56, has the following definition:

"* * The words 'delinquent child' shall include any child under the age of seventeen years who violates any law of this state, or any city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly visits or enters

May 31, 1945

a house of ill-repute or any place where any gaming device is operated; or any saloon or dramshop where intoxicating liquors are sold; or who is either habitually truant from any day school, or who, while in attendance at any school, is incorrigible, vicious or immoral. * *"

These definitions are not identical but a judgment of delinquency under either has the same effect. The purpose of the Juvenile Act is not to convict minors of criminal acts but to safeguard and reform children that may have erred, Ex parte Januszewski, 196 Fed. 123. The following quotation from the case of State ex rel. Matacia v. Buckner, 300 Mo. 559, 1. c. 364, is very enlightening on the juvenile delinquency law:

"The second contention is that the proceeding is one for the punishment of crime and that the act is invalid because it denies relator the protection of certain constitutional provisions applicable to trials for crime. There is language in the act that gives color to the view that it authorizes trial and punishment for crime. It is obvious that a child on trial for crime with a view to his conviction and punishment for the crime itself, as such, is entitled to invoke all the constitutional provisions applicable in such a situation. If he is old enough to be tried and punished for crime, he cannot be denied constitutional rights as a defendant in a criminal case because he has not attained a particular age. (State ex rel. v. Tinscher, 258 Mo. 1. c. 19, et seq.) The act has another aspect in which it is not affected by this rule. Its principal, if not sole, purpose is not trial and punishment for crime, but the protection and support of neglected children and the reformation of delinquent children. It is well settled that in the case of delinquent children the State has the power in proper circumstances to take over their custody in order to insure their security, training

and reformation (State ex rel. v. Tinch, supra, and cases cited; In re Sharp, 15 Idaho, 120, 18 L. R. A. (N. S.) 886, and note; In re Hook, 95 Vt. 497, 115 Atl. 730.) The power exerted by the State, parens patriae, is asserted in its right to supply proper custody and care in lieu of that of which neglected and delinquent children are deprived. (Farnham v. Pierce, 141 Mass. 1, c. 205; Ex parte Ah Peen, 51 Cal. 280; In re Turner, 94 Kan. 115, and cases cited.) A proceeding under the act, the aim of which, as in this case, is the exertion of the State's power, parens patriae, for the reformation of a child and not for his punishment under the criminal law, is not a criminal case, and the constitutional guaranties respecting defendants in criminal cases do not apply. This is obviously true and is the rule of the decisions. (In re Sharp, supra, and cases cited; Com. v. Fisher, 213 Pa. 48; State v. Brown, 50 Minn. 353; Pugh v. Bowden, 54 Fla. 302; Ex parte Bowers, 73 Ore. 1, c. 395; In re Powell, 6 Okla. Cr. 1, c. 507 et seq.; Ex parte Januszowski, 196 Fed. 123; United States ex rel. v. Behrens, 197 Fed. 953; Ex parte Bartee, 76 Tex. cr. 1, c. 287 et seq.) In this case the alleged criminal act of relator is not set up as a charge of crime and a predicate of punishment under the criminal law, but merely as the thing which brings relator within the definition of 'delinquent children' in the act and shows he is within the class over which the State is authorized to exert its power of quasi-parental control. (Childress v. State, 133 Tenn. 1, c. 123.) The informations are so drawn. The proceeding is not transformed into a prosecution for crime by the mere adoption of practice in criminal cases as far as applicable under the act. The purpose and substance of the act remains as before. Convenient machinery at hand is

May 31, 1945

borrowed by the act to avoid the necessity of setting up independent machinery of its own."

Another helpful quotation is taken from the case of State ex rel. Shartel v. Trimble, 353 Mo. 888, 1. c. 391:

"* * * A minor under the age of seventeen years cannot be convicted of a crime in a proceeding in a juvenile court, as the term conviction is understood in law. (State ex rel. v. Walker and Ex parte Bass, supra; State v. Naylor, 328 Mo. 335, 40 S. W. (2d) 1. c. 1082 (6).) The juvenile court can only adjudge a child a neglected child or a delinquent child. The two terms have a distinct and separate meaning under the Juvenile Act. A child may be of good character and yet, through no fault of its own, be declared a neglected child. (3) A delinquent child means one who has been guilty of violations of the law or is incorrigible, vicious or immoral. (Sec. 14136, R. S. 1929, Ex parte Naccarat, 328 Mo. 722, 41 S. W. (2d) 176.) If a child is proceeded against as a delinquent the final judgment of the juvenile court, if against the child, can only be a judgment declaring it to be delinquent. It is immaterial whether the misconduct charged against the child, by the information, consists of violations of the criminal statutes or of conduct, though not violations of the law, which nevertheless renders the child incorrigible, vicious or immoral. In either case the judgment must be that the child is a delinquent. The juvenile court then has the authority to place the minor on probation or in some institution other than the penitentiary. * * *"

From these extracts from decisions it is apparent that a judgment of delinquency rendered in the juvenile court is not a conviction but a civil judgment.

May 31, 1945

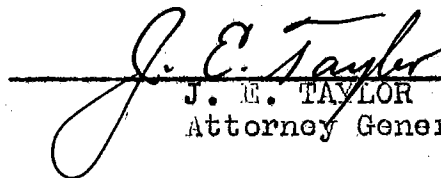
Conclusion

From the foregoing it is the conclusion of this Department that sentences to the Intermediate Reformatory can only be pronounced upon a first conviction and that any subsequent sentence must be to the Penitentiary. Further, that a judgment of juvenile delinquency cannot be considered as a conviction, even though the delinquency was proven by proof of acts which constitute felonies under the laws of Missouri.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

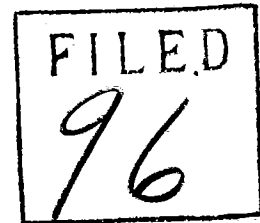

J. E. TAYLOR
Attorney General

WOJ:EG

PENITENTIARY: Prosecution of escapes and payments of rewards for apprehension and delivery of escapees.

August 29, 1945

9/5



Honorable Thos. H. Whitecotton
Director, Department of
Penal Institutions
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based upon the following statement:

"Attached is correspondence relating to the payment of rewards for the arrest and detention of Charles Enochs, #55334, and Thomas Ford, #40824, who boarded a train at Boonville on July 28 and were apprehended at Marshall the same day.

"Those inmates of the Penitentiary were assigned as trustees at Boonville and were working at the Power House as fireman and engineman.

"I will appreciate your opinion as to whether those men so assigned can legally be charged with an escape and whether, if they cannot be charged with escape, the Penal Board could legally pay a reward for their apprehension and detention."

Section 4307, R.S. Mo. 1939, reads:

"If any person confined in the penitentiary for any term less than life shall escape from such prison, or, being out under guard, shall escape from the custody of the officers,

August 29, 1945

he shall be liable to the punishment imposed for breaking prison."

In the case of State v. Betterton, 295 S.W. 545, a convict escaped from a prison farm and was prosecuted for that escape under Section 4306, R.S. Mo. 1939, which covers the escape of an inmate confined in the penitentiary or the convict in lawful custody going to the penitentiary. The court held in this case that an escape from a place outside the penitentiary is a violation of Section 4307, supra, and said:

"* * * * it does not follow that the escape of a 'trusty' convict from the place of his employment and detention outside of and remote from the penitentiary is an escape from the penitentiary. * * * *"

The court further said:

"Our investigation discloses that section 3161, R.S. 1919 (now Section 4307), was framed to cover escapes of convicts under the circumstances shown by this record."

In the case of Ex parte Rody, 152 S.W. (2d) 657, the Supreme Court said:

"* * * * Sec. 4306 applies to convicts in lawful custody going to the penitentiary, and to those who break the prison walls and escape after they are in. Sec. 4307, supra, specially applies to convicts who escape from the custody of the officers while out under guard * * * *"

The court held in the Betterton case that a convict who escaped while outside the prison walls could not be prosecuted under Section 4306, R.S. Mo. 1939, because he was not confined in the penitentiary, and in the Rody case affirmed that ruling. The court also held that said convict, while outside the walls of the penitentiary, was constructively confined in the penitentiary and subject to the rules and regulations thereof.

Section 9081, R.S. Mo. 1939, regulates the paying of rewards for the apprehension and delivery of escaped convicts, and reads as follows:

August 29, 1945

"Whenever any convict shall escape from the penitentiary, it shall be the duty of the commission to take all proper measures for the apprehension of such convict; and for that purpose it shall offer to pay a reward, not exceeding one hundred dollars, if such convict be apprehended outside of Cole County, and twenty-five dollars if such convict be apprehended in Cole county, for the apprehension and delivery of such convict; such reward shall be chargeable to the state."

You will note that Section 9081, supra, states "whenever any convict shall escape from the penitentiary." This section does not make it necessary for the escape to have been from within the penitentiary, therefore an escape from outside the penitentiary would come within Section 9081, supra, in view of the ruling in the Rody case, supra, holding that such convict would be constructively confined in the penitentiary.

Conclusion.

It is the opinion of this department that the convicts mentioned in your request for an opinion could be prosecuted under Section 4307, supra, and that the Penal Board could legally pay a reward for the apprehension and delivery of said convicts, as provided by Section 9081, supra.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

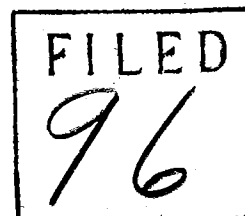
WBD:ml

Convicts:

Convicts released under Section
9086, R.S. Mo. 1939 - 9/12 service
of sentence.

August 30, 1945

9/5



Honorable Thos. E. Whitecotton
Director, Department of
Penal Institutions
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an
opinion, based upon the following state of facts:

"I shall appreciate your help
in clarifying a matter of records
at this institution which is ex-
plained below:

"John Doe was sentenced to this
institution to serve fifteen years
and ten years consecutively. After
the 9/12 expiration date of the 15-
year sentence subject escaped. Our
records indicate that he was dis-
charged on the 15-year sentence and
that the 10-year sentence was flat-
tened, that is, for his escape he
will be held to serve the full 10
years on the second sentence.

"This subject claims that under
the old rule he would have been
eligible for a 7/12 discharge on
the 15-year sentence and that by
serving the 9/12 he lost 30 months.
Due to his escape and being held to
serve the full 10-year sentence, he
has lost an additional 30 months.

"I shall appreciate your opinion
as to how in such cases we may de-
termine whether this man should have

August 30, 1945

served the first 15 years 7/12 or 9/12. I realize that under the law he would be held to serve nine months on the year if there were no violations of the rules, but due to the prevailing practice before this year, many inmates were released by the Penal Board after serving seven months on the year. In some instances, the records indicate that in multiple sentences a man escaped and was required to serve full time on the total of the multiple sentence."

Section 9086, R.S. Mo. 1939, is the only statute covering the release of convicts on a so-called merit time. This statute provides:

"Any convict who is now or may hereafter be confined in the penitentiary, and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the prison or laws of the same recorded against such convict, shall be discharged in the same manner as if said convict had served the full time for which sentenced, * * * *"

Your letter states that this convict escaped after the 9/12 expiration date and discharge of his first sentence. As a legal proposition the service of 9/12 time and discharge, as noted on your records, would fully comply with Section 9086, R.S. Mo. 1939, as to his first sentence. His escape, while serving the second sentence, would not entitle him to discharge under the 9/12 statute, thereby causing him to serve the full 10 years.

The fact that heretofore the Penal Board allowed convicts to be released on 7/12 service of their sentence was only a rule of the Penal Board, and was not authorized by statute.

The fact that your records show this convict was discharged on his first sentence, after he had served 9/12 thereof, would indicate that it was the intention of the Board not to release him under the 7/12 rule. The Board could, however, take this into consideration in granting a parole.

Honorable Thos. E. Whitecotton -3-

August 30, 1945

Conclusion.

It is the opinion of this department that, in determining the date of expiration of a sentence of a convict, the 9/12 rule should apply, unless released otherwise by parole or pardon.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml

COUNTY: To pay for support and maintenance of boys under seventeen years of age, committed to the Missouri training school for boys.

October 5, 1945

FILED

96

Honorable Thos. E. Whitecotton, Director
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

Your letter of October 1st, 1945, addressed to General Taylor, requesting an opinion on certain charges for inmates committed to the Missouri Training School for Boys at Boonville, is as follows:

"Our records indicate that for a number of years the maintenance of boys committed to the Missouri Training School for Boys at Boonville has been charged to the State of Missouri and paid from an appropriation entitled 'Costs in Criminal Cases Reformatory.' Section 9004, 'Revised Statutes 1939' relating to costs and how paid reads as follows:

'In all cases of conviction of felony, wherein the punishment is committed (commitment) to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the county in which the conviction is had

"Section 9005, relating to expenses and how paid, reads as follows:

'There shall be paid to the commission of the department of penal institutions the sum of fifteen dollars per month for the support, maintenance, clothing and all other expenses of each person committed to said Missouri training school for boys, from the time of his reception into said institution until his discharge therefrom:

"Section 9006, relating to expenses paid by county in certain cases, reads as follows:

'When any boy under seventeen years of age shall be committed to said Missouri training school for boys by any court having competent jurisdiction, upon conviction of any felony or misdemeanor, or when the governor, except as hereinafter provided, shall commute the sentence of any person from imprisonment in the penitentiary to commitment to the Missouri training school for boys, the expenses of the maintenance of said boy, as provided in the foregoing section, shall be paid by the county in which he was convicted When any person between seventeen and twenty-one years of age shall be committed by a court having competent jurisdiction, to confinement in said Missouri training school for boys, or is transferred from the penitentiary to said Missouri training school for boys by order of the governor, the support of such person shall be paid by the state out of money appropriated for that purpose

"I have on my desk at this time invoices from Boonville to the State Auditor for the quarter beginning January 1, 1945 in the

Oct. 5, 1945

amount of \$4,036.50, and for the quarter beginning April 1, 1945 in the amount of \$4,118.50. There was appropriated for this period in the 'Costs in Criminal Cases Reformatory' \$2,500.00. There is at this time a deficit in the Auditor's Office of \$5,564.00 due the Missouri Training School for Boys Earning Fund which will require a deficiency appropriation.

"I have also an invoice to the State Auditor from the Missouri Training School for Boys for the quarter beginning July 1, 1945 in the amount of \$4,043.00. The appropriation for the fiscal year 1945-46 'Costs in Criminal Cases Reformatory' was \$5,000.00. This amount, budgeted quarterly, provides only \$1,250.00 and since the first quarter has already been paid to the Missouri Training School, there is now a deficit in this period of \$2,793.00. Should these charges continue to be made to this fund, a deficit of some \$15,000 to \$18,000 will be created by the end of this fiscal year.

"We respectfully request your official opinion as to whether these charges are correct or whether under the law above cited all of these charges should be against the counties in which inmates of the Reformatory were convicted."

The foregoing sections, referred to in your letter, being Sections 9004, 9005 and 9006, R. S. Mo. 1939, constitute the law governing the question asked in your letter, and, for the purpose of this opinion said sections are herein set out in full, as follows:

Sec. 9004:

"In all cases of conviction of felony, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid

by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the Missouri training school for boys, the cost of the proceedings and of the delivery of such person to the Missouri training school for boys shall be paid by the county in which the conviction is had. The sheriff, marshal or other person charged with the delivery of any person to the Missouri training school for boys shall be allowed the necessary traveling expenses of himself and such person, and a per diem of two dollars for the time actually occupied in taking such person to said Missouri training school for boys and in returning therefrom, to be paid by the state or county, as the case may be."

Sec. 9005:

"There shall be paid to the commission of the department of penal institutions the sum of fifteen dollars per month for the support, maintenance, clothing and all other expenses of each person committed to said Missouri training school for boys, from the time of his reception into said institution until his discharge therefrom: Provided, that no payment shall be made for the time that any such person may be absent from the Missouri training school for boys on probation. All payments shall be made quarterly in advance: Provided, that all payments for the support of persons chargeable to a county shall be paid by such county in cash, and for that purpose the county court is authorized to discount its warrants, but the Missouri training school for boys shall not receive any county warrants for the maintenance and support of any person committed to such institution."

Sec. 9006:

"When any boy under seventeen years of age shall be committed to said Missouri train-

ing school for boys by any court having competent jurisdiction, upon conviction of any felony or misdemeanor, or when the governor, except as hereinafter provided, shall commute the sentence of any person from imprisonment in the penitentiary to commitment to the Missouri training school for boys, the expenses of the maintenance of said boy, as provided in the foregoing section, shall be paid by the county in which he was convicted. The clerk of the court in which the conviction is had shall certify the judgment of conviction to the county court of said county, and the governor shall cause to be certified to said county court any commutation made by him. The commission of the department of penal institutions shall cause to be filed with the said court a certificate showing the date when such boy was received into said institution, and the support of said boy, at the rate and in the manner stated in the foregoing section shall be paid by said county upon an account presented by the secretary of said commission to said county court: Provided, that all payments for the support of persons chargeable to a county shall be paid by such county in cash, and for that purpose the county court is authorized to discount its warrants, but the Missouri training school for boys shall not receive any county warrants for the maintenance and support of any person committed to such institution. When any person between seven-teen and twenty-one years of age shall be committed, by a court having competent jurisdiction, to confinement in said Missouri training school for boys, or is transferred from the penitentiary to said Missouri training school for boys by order of the governor, the support of such person shall be paid by the state out of money appropriated for that purpose, and the auditor shall draw its warrant therefor in favor of the commission of the department of penal institutions quarterly upon requisitions filed with him by the secretary of

said commission; and provided further, that if it shall be shown to the court before which the conviction is had that any person committed to said Missouri training school for boys, has an estate sufficient to maintain him at said institution, judgment shall be entered against him for his maintenance while confined in said institution; but if such person is under twenty-one years of age, such judgment shall be against his guardian, curator or other person having possession of his estate to pay to the commission of the department of penal institutions, quarterly in advance, the amounts hereinbefore provided for his support in said institution."

(Emphasis ours.)

"All sections of an act must be construed together and harmonized if possible."

(In re Rosing's Estate, 85 S.W. (2d) 495, 337 Mo. 544.)

"Where a statute is plain and unambiguous there is no room for construction."

(State v. Mills, 142 S.W. 477, 161 Mo. App. 179.)

"Intent of Legislature as expressed in statute must be given effect where meaning is plain."

(Betz v. K. C. So. Ry. Co., 284 S.W. 455, 314 Mo. 390.)

Maintenance of a person is defined in Vol. 38 C. J., p. 338, as: "Supply of the necessities of life."

Vol. 18 C. J. S., Sec. 12, p. 113, entitled "Support and Maintenance," reads as follows:

Oct. 5, 1945

"The expense of maintenance of persons who have been committed to prison for violations of the criminal law may, in varying circumstances and under governing statutes, be imposed on the federal government, a state, a county, a municipality, or the prisoner himself.

"Contractors for the labor of state or county convicts may be bound by law, or by the express terms of their contracts, to support in a suitable manner the convicts committed to their charge, and this includes not only food and clothing, but also suitable and necessary medical care and attention."

From the foregoing it is apparent that these sections should be read together and, where statutes are plain and unambiguous, they need no construction.

CONCLUSION

Therefore, it is the opinion of this department that each county should pay the sum of \$15.00 per month for the expenses and maintenance of each boy under seventeen years of age sentenced to the institution, and the State should pay the expenses and maintenance of each boy between the ages of seventeen and twenty-one years of age admitted to such institution, except where such boy has an estate of his own sufficient to support him.

Respectfully submitted,

GORDON P. WEIR
Assistant Attorney General

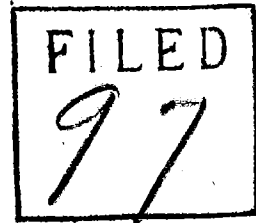
APPROVED:

J. E. TAYLOR
Attorney General

GPW:CP

TAXATION AND REVENUE: Construction of Sec. 3, Art. X, and Sec. 23, Art. IV, Constitution of Missouri of 1945, and of Secs. 2 and 5 of the Schedule appended thereto.

April 27, 1945



Senator H. R. Williams
Honorable Randall R. Kitt
Co-Chairmen
Joint Planning Committee of the General Assembly
Jefferson City, Missouri

Gentlemen:

Reference is made to your letter under date of April 18, 1945, requesting an official opinion of this office, and reading as follows:

"Pursuant to a resolution adopted by the Joint Planning Committee of the General Assembly, your opinion is respectfully requested upon the following:

"Under the provisions of Section 3 of Article X of the present constitution with respect to the assessment and collection of taxes within the same fiscal or calendar year and the provisions of the schedule, particularly Section 5 thereof, would statutory provisions, present or future, providing for the collection of taxes after July 1, 1946, upon the assessment to be made as of June 1, 1945, be valid?

"While this question may be moot at the present time, it is one now confronting this Committee and the General Assembly. Due to its importance and urgency, your official opinion at your earliest convenience will be greatly appreciated by this Committee and various members of the legislature."

April 27, 1945

Your inquiry resolves itself into two component parts:

(1) Will the present statutes permit the collection of taxes subsequent to July 1, 1946, based upon an assessment of property made as of June 1, 1945, as provided by such statutes?

(2) Can statutes be enacted by the General Assembly in the future providing for the collection of taxes subsequent to July 1, 1946, based upon an assessment of property made as of June 1, 1945?

In view of the fact that under the present statutes the only taxes which could become due subsequent to July 1, 1946, are general property taxes, we have confined this opinion to that type of taxes.

I.

With reference to Part (1) of your inquiry, it is necessary to consider the present scheme for the collection of taxes. It is provided by the existing statutes that assessments be made as of June 1 of each year, that after adjustment and corrections of such assessments by the county and state boards of equalization, the county court makes levies of taxes based upon such assessments, and that such taxes so assessed and levied be due and payable not later than December 31 of the ensuing calendar year.

The question of time being pertinent to the matter at hand, we note that the existing statutes require the assessment to be made as of June 1; that action be taken by the state board of equalization commencing the last Wednesday of February of the following year; that action be taken by the county board of equalization thereafter, which cannot be completed prior to the fourth Monday in April following; that thereafter, as soon as may be, the county court shall make the levy; that the county clerk thereafter extends the taxes, having ninety days in which to do so; that thereafter, as soon as may be, the tax book be delivered to the collector; and that the taxes so assessed and levied become due upon delivery of the tax book to the collector.

Article X, Section 3, of the Constitution of 1945, reads, in part, as follows:

" * * * All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. * * * "

Referring to the existing statutes pertaining to the assessment and collection of taxes, it is apparent that they are inconsistent with the quoted portion of the Constitution of 1945. Therefore, Section 2 of the Schedule appended to the Constitution of 1945 becomes pertinent. It reads, in part, as follows:

" * * * All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

This would have the effect of keeping the existing statutes operative until July 1, 1946, in the absence of action being taken by the General Assembly, but since the collection statutes would expire long before the due date of the taxes, no method would exist to enforce collection thereof.

It is true that the lien of the State for its taxes would attach under existing statutes, provided that the order fixing the levy be made by the county court prior to July 1, 1946; it having been so held in *State v. Childress*, 134 S. W. (2d) 136, from which we quote:

"The state's lien for taxes 'does not accrue and become a fixed encumbrance until the amount of the tax is determined by an annual assessment of the land and annual levy of the tax.' *McAnally v. Little River Drainage District*, 325 Mo. 348, 28 S. W. 2d 650, 651."

The General Assembly could not enact valid laws to provide for the enforcement of the lien, even though attached, because whatever statutes are enacted must conform to the Constitution of 1945, and any laws looking to the enforcement of the State's

April 27, 1945

lien for such taxes would contravene Article X, Section 3, above quoted, in that the taxes sought to be collected would not have been based upon an assessment made in the same fiscal or calendar year.

We have also considered Section 5 of the Schedule appended to the Constitution of 1945, in connection with this phase of your inquiry. It reads, in part, as follows:

" * * * all fines, taxes, penalties and forfeitures assessed, levied, due or owing prior to the adoption of this Constitution shall continue to be as valid as if this Constitution had not been adopted."

This has the effect of saving only taxes assessed or levied prior to the adoption of the new Constitution. The new Constitution was adopted as of March 30, 1945; consequently, Section 5 is inapplicable to assessments made as of June 1, 1945.

We conclude from the above that taxes assessed and levied under existing statutes could not be collected subsequent to July 1, 1946.

II.

With reference to Part (2), we believe the following to be germane:

The pertinent portion of Section 3, Article X, to which you refer, reads as follows:

" * * * All taxes shall be levied and collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed. * * * "

It is therefrom quite apparent that under the Constitution of 1945 the General Assembly is authorized to provide a scheme for the assessment, levy and collection of taxes, sub-

April 27, 1945

ject to the limitation that such scheme be one that shall be completed within a period of one year. The year may be either the calendar year or the fiscal year. The fiscal year of the state is defined in Section 23, Article IV, of the Constitution of 1945, from which we quote:

"The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year."

We are of the opinion that the above quoted portions of the Constitution of Missouri of 1945 are controlling with respect to the question proposed in your letter of inquiry. We have also considered Section 5 of the Schedule appended to the Constitution, but do not consider it applicable to the matter at hand, as we think that Section 5 is merely a saving clause designed to protect rights which had become fixed prior to the adoption of the Constitution, and of course could not affect assessments made June 1, 1945, such assessments being subsequent to the date of the adoption of the Constitution.

CONCLUSION

In the premises, we are of the opinion that taxes based upon assessments made as of June 1, 1945, under existing statutes, could not be collected subsequent to July 1, 1946, and that the General Assembly cannot provide by statutory enactment for their collection, as such statutes would be in contravention of Article X, Section 3, of the Constitution of 1945.

We are of the further opinion that after harmonizing the above quoted provisions of the Constitution of 1945 and construing them together, that the General Assembly is not authorized to provide a scheme for the collection of taxes subsequent to July 1, 1946, based upon assessments made June 1, 1945; and that statutory enactments to that effect would be invalid as being in contravention of Article X, Section 3, of the Constitution of 1945, in that such scheme, of which such statutory enactments would form a part, would not be completed

Senator H. R. Williams

-6-

April 27, 1945

from assessment to collection of taxes within either the calendar or fiscal year subsequent to June 1, 1945.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

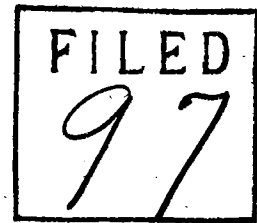
APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

COUNTY: Liability for costs in prosecution of
CRIMINAL: driving motor vehicle while intoxicated
COSTS: upon acquittal.

May 23, 1945



Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"I would like to have an opinion as to the liability for criminal costs payable by the County:

"In a prosecution of a defendant for driving a motor vehicle while intoxicated - defendant acquitted:

"Is the County liable for defendant's witness fees and mileage attending Circuit Court and the preliminary examination?

"Is the Sheriff entitled to mileage and fees summoning defendant's witnesses?"

Section 8401, R.S. Mo. 1939, sub-section (g), makes it an offense for driving a motor vehicle while in an intoxicated condition or when under the influence of drugs. Said sub-section is as follows:

"Miscellaneous offenses. * * * * *

"(g) Driving in intoxicated condition:
No person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs."

May 23, 1945

Section 8404, R.S. Mo. 1939, provides a penalty for the above violation, under sub-section (c), making the offense a graduated felony. Sub-section (c) reads as follows:

"Any person who violates paragraph (a) of section 8396, paragraph (a) of section 8398 or paragraph (f) or (g) of section 8401 shall be deemed guilty of a felony and on conviction thereof shall be punished by imprisonment in the penitentiary for a term not exceeding five years or by confinement in the county jail for a term not exceeding one year, or by a fine not exceeding one hundred dollars (\$100.00) or by both such fine and imprisonment."

Section 4223, R.S. Mo. 1939, provides that in case of capital cases and those in which the sole penalty is imprisonment in the penitentiary, upon acquittal, the State shall pay the court costs; that all other trials on indictment or information, if the defendant be acquitted, the costs shall be paid by the county, except when the prosecutor shall be adjudged to pay them or otherwise provided by law. Said section reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Section 4226, R.S. Mo. 1939, provides that when any person shall be committed or recognized to answer for a felony, and no indictment against such person shall be found, the prosecutor, or person on whose oath the prosecution was commenced, shall be liable for all costs incurred and judgment shall be rendered against him. Said section is as follows:

"In all cases where any person shall be committed or recognized to answer for a felony, and no indictment shall be found

against such person, the prosecutor, or person on whose oath the prosecution was commenced, shall be liable for all the costs incurred in that behalf; and the court shall render judgment against such prosecutor for the same, and in no such case shall the estate or county pay such costs."

Under Section 3900, R.S. Mo. 1939, the prosecuting attorney is specifically exempt from liability for costs in any case. Said section reads as follows:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3895, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."

In *City of Carterville v. Cardwell*, 152 Mo. App. 32, 132 S.W. 745, the court defines costs in criminal proceedings as charges fixed by law which have been necessarily incurred in the prosecution of one charged with a public offense as compensation to the officers for their services rendered.

In *re Thomasson*, 159 S.W. (2d) 626, 1.c. 628, the court held that costs were unknown to the common law and the right to costs is wholly dependent on statutory provisions allowing same. In so holding the court said:

" * * * * The parties do not cite us to a statute or a case specifically covering a situation such as we have here. In the first place costs were unknown to the common law and one's right to costs is now wholly dependent on statutory provisions allowing them. And such statutes are

May 23, 1945

strictly construed. 7 R.C.L., sec. 2, p. 781; Van Trump v. Sanneman, 193 Mo. App. 617, 187 S.W. 124; Ex parte Nelson, 253 Mo. 627, 162 S.W. 167. There being no statute specifically allowing costs in such instances or under such circumstances or in such a manner is sufficient to exclude the claims of the appellant. * * *

It was also held in Cramer v. Smith, 350 Mo. 736, 168 S.W. (2d) 1039, that in criminal cases as in civil cases the recovery and allowance of costs rests on statutory provisions, and in the absence of statutory authorization no right to or liability for costs exists.

Article 2, Chapter 99, R.S. Mo. 1939, provides for mileage and fees for summoning witnesses and this includes both witnesses for the state and defendant.

Section 4231, R.S. Mo. 1939, provides that the defendant shall be entitled to process for witnesses to be issued and directed to the sheriff, so unquestionably the fee and mileage caused in summoning witnesses for the defendant constitutes part of the court costs.

In view of the foregoing authorities and citations it is the opinion of this department that this offense constitutes a felony. However, the punishment proscribed by statutes makes it a graduated felony and the penalty provided by statutes does not require the person to be confined exclusively to the State Penitentiary, therefore the state is not required to pay the costs upon acquittal, but the county must assume said costs as provided in Section 4223, supra, except when the prosecutor shall be adjudged to pay said costs as provided under Section 4226, supra. It is the further opinion of this department that upon acquittal for the offense herein charged, the county is likewise subject to mileage and fees incurred by the sheriff in summoning defendant's witnesses.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

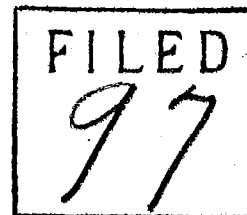
APPROVED:

J. E. TAYLOR
Attorney General

ARH:ml

GAMBLING: Setting up or using punch boards violate the provisions of Section 4678, R. S. Mo. 1939.

May 28, 1945



Mr. Hugh P. Williamson
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Mr. Williamson:

We acknowledge your request for an opinion, as follows:

"I am writing to inquire whether in your opinion a Punch Board would be considered a gaming and gambling device contrary to the statute.

"These boards, as you may know from observation, have a group of squares on them which are numbered for the consideration of the nickel or dime or quarter to punch one of the squares and get out a number. If this is a lucky number one receives a box of candy or some other valuable article. I believe that the chance for drawing a prize is somewhere in the neighborhood of 100 to 1.

"I would appreciate your opinion on this matter. I find nothing in the law which talks specifically about a punch board. The test of whether a device is a gambling device is whether it is preponderantly a matter of chance and these punch boards certainly are."

In the case of State v. Turlington, 204 S. W. 821, 200 Mo. App. 192, the defendant was charged by information of the Prosecuting Attorney with violating Section 4753, R. S. Mo. 1909 (now Section 4678, R. S. Mo. 1939) by per-

May 28, 1945

mitting a punch board, alleged to be a gambling device, to be used or operated in his store building.

Section 4678, supra, provides:

"Every person who shall permit any gaming table, bank or device to be set up or used for the purpose of gaming in any house, building, shed, booth, shelter, lot or other premises to him belonging or by him occupied, or by which he hath at the time the possession or control, shall, on conviction, be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail or workhouse for not more than one year nor less than thirty days, or by fine not exceeding five hundred dollars or less than fifty dollars."

The point was made by the appellant in the above case, that the manner in which he conducted the punch board was no offense under the law. The court said that the evidence showed:

"The evidence shows that the punch board was a board in which there were a great many holes. In each of these holes was a small strip of paper containing a number. These holes were covered, but the cover was so designed as to indicate exactly the location of each hole. The prizes were knives and post cards. The knives ranged in value from 50 cents to \$1.50, and the post cards were worth 3 cents each. A small wooden pin was used to punch the covering of the hole. Five cents a punch was charged, and the number on the slip of paper in the hole punched indicated whether a post card or a knife was the reward, and, if a knife, it indicated what knife. There were no blanks. The purchaser of a punch got a post card or a knife. When the board was first set

up a 'punch' was sold for 5 cents; but, being advised that there might be less taint of a gamble or game of chance if the post card was sold in advance, this method was adopted. The post card was sold for 5 cents, and the purchaser was then entitled to a punch. If he got a knife, he was a post card ahead, as compared with original system. The defendant would buy back for three cents the post card if the purchaser desired to sell it. The defendant testified that the post card cost 3 cents, and that he bought back a number of them. So in any event the defendant was 2 cents ahead if the purchaser who got a post card did or did not sell it back. The slips of paper in the holes calling for post cards were far in excess of those calling for knives so that when the entire board was punched there was a margin of gain in favor of the defendant."

And, in holding that such was a gambling device, said:

"Clearly we think such board falls within the class of gambling devices. The incentive prompting any one to take a punch was the chance of getting something of more value than the cost of the chance. The amount of the winner's gain or loser's loss would make no difference, if the chance to win more than was invested was present. It is this chance to get something of more value than the amount invested that characterizes the device as a gambling one. Had the post card which was always drawn, except when a prize of more value was drawn, been in fact of the value of five cents, so that there would have been no chance for the customer or patron to lose, this would not purge the enterprise of its chance character-

istics, because the chance to win more than invested yet remained. This is clearly the law as written in *Moberly v. Deskin*, 169 Mo. App. 672, 155 S. W. 842, from which we quote:

"The chief element of gambling is the chance or uncertainty of the hazard. It is not essential that one of the party to the wager stands to lose. The chance taken by the player may be in winning at all on the throw, or in the amount to be won or lost, and the transaction should be denounced as gaming whenever the player hazards his money on the chance that he may receive in return money or property of greater value than that he hazards. If he is offered the uncertain chance of getting something for nothing, the offer is a wager, since the operator offers to bet that the player will lose and in accepting the chance the player bets that he will win. Such offer, therefore, is a direct appeal to the gambling instinct, which, it is said, possesses every man in some degree, and it is the temptation to gratify the instinct that all penal laws aimed at gambling are designed to suppress."

The court, in passing on the sufficiency of the information under Section 4753, *supra*, said:

"The sufficiency of the information is challenged. Omitting formal parts, the information is as follows:

"That J. A. Turlington * * * did unlawfully permit a certain gambling device called a punch board, designed and used for the purpose of playing games of chance for money and property,

May 28, 1945

to be used for the purpose of gambling in a certain building there situate, and under the control of him, the said J. A. Turlington,' * * * * *

"The information charges the offense in the language of the statute, and follows approved forms and precedents, and, we think, is sufficient. State v. Wade, supra; State v. Leaver et al., 171 Mo. App. 371, 157 S. W. 821; State v. Howell, 83 Mo. App. 198; Kelly's Crim. Law & Pr. (3rd Ed.) Sec. 953."

In the Turlington case, supra, the court said:

"It is this chance to get something of more value than the amount invested that characterizes the device as a gambling one,"

From the foregoing, we are of the opinion that punch boards are covered by Section (4753 R. S., 1909) 4678 R. S. Mo., 1939.

CONCLUSION

Therefore, it is the opinion of this department that any person who allows any device known as a punch board, which requires a consideration to be paid wherein there is a chance to get something of more value than the amount invested, to be set up or used on his premises is in violation of Section 4678, R. S. Mo. 1939.

Respectfully submitted,

APPROVED:

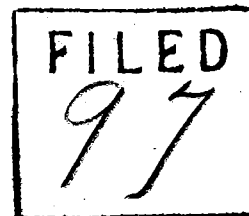
J. E. TAYLOR
Attorney General

A. V. OWSLEY
Assistant Attorney General

AVO:CP

CRIMINAL LAW: Civil courts of this state have jurisdiction to try military personnel for offenses against the civil laws of Missouri.

October 2, 1945



10-3

Mr. Hugh P. Williamson
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated September 29, 1945, in which you state that you desire to prosecute a member of the Armed Forces of the United States in the Circuit Court of Callaway County for the offense of stealing a motor vehicle. Accompanying your request is a copy of a telegram from the Bureau of Naval Personnel in Washington, D. C., advising that the return of this individual to naval custody is not desired until charges pending against him in the civil courts are fully disposed of. You desire our opinion as to whether the civil courts would have jurisdiction of an offense against the civil laws of this state committed by a member of the Armed Forces.

A search of Title 34 of the United States Code of Laws, which pertains to the organization and government of the United States Navy, fails to reveal any statute covering this situation, and there appear to be no cases decided involving a member of the Navy.

We find a case involving a soldier of the United States Army, which we believe to be in point. In time of peace, commanding officers of the United States Army are required to deliver offenders against the civil laws to civil authorities for trial, by Section 1546, Title 10, United States Code of Laws. However, in time of war, this section is inoperative and members of the United States Army are in the same situation as those of the Navy, that is, there is no statutory provision covering the situation at hand.

October 2, 1945

In *Caldwell v. Parker*, 252 U. S. 376, 64 L. Ed. 621, the appellant, a soldier in the Army of the United States, serving in Alabama, was tried and convicted of the murder of a civilian within the state of Alabama and not within the confines of any military reservation. The conviction was affirmed by the Supreme Court of Alabama, and appellant sought to reverse the action below on the ground that the state court had no jurisdiction of the person of appellant, as that power was exclusively vested in a court-martial, since he was a member of the Armed Forces. There had been no demand made by military authorities for the return of appellant prior to his sentence, and the telegram submitted by you with your request clearly indicates that the United States Navy has no intention of demanding custody of the accused until the charges against him are completely disposed of.

After considering Section 1546, Title 10, United States Code of Laws, referred to above, the opinion in *Caldwell v. Parker*, supra, states, 1. c. 624 (L. ed.):

"Comprehensively considering these provisions, it is apparent that they contain no direct and clear expression of a purpose on the part of Congress, conceding, for the sake of the argument, that authority existed under the Constitution to do so, to bring about, as the mere result of a declaration of war, the complete destruction of state authority and the extraordinary extension of military power upon which the argument rests. This alone might be sufficient to dispose of the subject, for, as said in *Coleman v. Tennessee*, 97 U. S. 509, 514, 24 L. ed. 1118, 1121: 'With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.' Certainly, it cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted, since the Articles of War, originally adopted in 1775, were, as we have

October 2, 1945

seen, in the very midst of the War for Independence, modified in 1776 to make certain the preservation of the civil power.

* * * * *

" * * * We say this because even though it be conceded that the purpose of Congress by the Article of 1916, departing from everything which had gone before, was to give to military courts, as the mere result of a state of war, the power to punish as military offenses the crimes specified when committed by those in the military service, such admission is here negligible because, in that view, the regulations relied upon would do no more than extend the military authority, because of a state of war, to the punishment, as military crimes, of acts criminal under the state law, without the slightest indication of purpose to exclude the jurisdiction of state courts to deal with such acts as offenses against the state law.

* * * * *

"It follows, therefore, that the contention as to the enlargement of military power, as the mere result of a state of war, and the consequent complete destruction of state authority, are without merit, and that the court was right in so deciding and hence its judgment must be and it is affirmed."

The general rule is found in 6 C. J. S., page 425, Section 38, and is stated as follows:

" * * * The articles of war do not deprive the civil courts, either in time of peace or war, of the concurrent jurisdiction previously vested in them over crimes against either federal or state laws committed within the geographical limits of

October 2, 1945

the United States and the District of
Columbia by persons subject to military
law, * * *."

If a waiver from the United States Navy should be necessary in the case presented, we believe that the enclosure with your opinion request from the Bureau of Naval Personnel is sufficient. There is not available to us at the present time a copy of Navy Regulations, but we have been advised by the local office of the United States Navy, and it is a matter of common knowledge, that the Bureau of Naval Personnel has complete power over the assignment and release of naval personnel.

CONCLUSION

It is, therefore, our opinion that the civil court in this state having jurisdiction of the offense described by you has jurisdiction and may proceed with the trial of a member of the Armed Forces under the circumstances set out in your request.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RLH:HR

WEAPONS: State of Missouri does not require registration of pistols, revolvers or other firearms.

FILED

97

October 12, 1945

10/19

Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

We are in receipt of your letter of September 22, 1945, requesting an official opinion of this office, reading as follows:

"I would appreciate an opinion with respect to the 'registration' of firearms as referred to in Sec. 4827 RSMo 1939:

"There have been several inquiries recently from men returning from military service who have acquired pistols and revolvers, mostly in foreign countries, with respect to the registration of these weapons. In some instances, of course, it would not be possible to secure any definite information as to the exact source where these weapons were secured, except during combat.

"Is it necessary for a serviceman to secure a permit from the Circuit Clerk as contemplated under Sec. 4827?

"Should a serviceman be required to pay the 50¢ fee for such permit?"

October 12, 1945

We find that Section 4827, R. S. Mo. 1939, does not provide for the registration of pistols, revolvers or other firearms, but rather provides for obtaining a permit for acquiring possession of pistols, revolvers and firearms, capable of being concealed upon the person. This section reads as follows:

"No person within this state shall lease, buy or in anywise procure the possession from any person, firm or corporation within or without the state, of any pistol, revolver or other firearm of a size which may be concealed upon the person, that is not stamped as required by section 4825; and no person shall buy or otherwise acquire the possession of any such article unless he shall have first procured a written permit so to do from the circuit clerk of the county in which such person resides, in the manner as provided in section 4826."

In Section 4827, supra, reference is made to Sections 4825 and 4826, R.S. Mo. 1939. Section 4825 reads as follows:

"No wholesaler or dealer therein shall have in his possession for the purpose of sale, or shall sell, any pistol, revolver, or other firearm of a size which may be concealed upon the person, which does not have plainly and permanently stamped upon the metallic portion thereof, the trademark or name of the maker, the model and the serial factory number thereof, which number shall not be the same as that of any other such weapon of the same model made by the same maker, and the maker, and no wholesale or retail dealer therein shall have in his possession for the purpose of sale, or shall sell, any such weapon unless he keep a full and complete record of such description of such weapon, the name and address of the person from whom purchased and to whom sold, the date of

such purchase or sale, and in the case of retailers the date of the permit and the name of the circuit clerk granting the same, which record shall be open to inspection at all times by any police officer or other peace officer of this state."

Section 4825, supra, provides that any one in the business of selling pistols, revolvers or other firearms must have plainly stamped on the weapon certain information as set out in this section. It is further provided in this section that those persons in the business of selling weapons must keep records of such weapons, regarding descriptions of the weapons and records of the transactions involving their purchase and sale. The wording of the statute is quite clear in prescribing requirements for the stamping of the weapons and keeping records of the weapons.

If those persons engaged in the business of selling pistols, revolvers or other firearms comply with the provisions of Section 4825, supra, a complete record of persons procuring possession of pistols, revolvers and other firearms by purchase, and records of all relevant details incident to their purchase, will be available, and open to inspection at all times by any police officer or peace officer of this State. In other words, this section is not a law requiring a general registration of firearms in possession of persons within the State, but if those persons engaged in the business of selling weapons comply with the statute, much information is made available that would be available under a general registration law.

Section 4826, R. S. Mo. 1939, reads as follows:

"No person, other than a manufacturer or wholesaler thereof to or from a wholesale or retail dealer therein, for the purposes of commerce, shall directly or indirectly buy, sell, borrow, loan, give away, trade, barter, deliver or receive, in this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, unless the buyer, borrower or person receiving such weapon shall first obtain and deliver to, and the same be demanded and received by, the seller, loaner, or person delivering such weapon,

within thirty days after the issuance thereof, a permit authorizing such person to acquire such weapon. Such permit shall be issued by the circuit clerk of the county in which the applicant for a permit resides in this state, if the sheriff be satisfied that the person applying for the same is of good moral character and of lawful age, and that the granting of the same will not endanger the public safety. The permit shall recite the date of the issuance thereof and that the same is invalid after thirty days after the said date, the name and address of the person to whom granted and of the person from whom such weapon is to be acquired, the nature of the transaction; and a full description of such weapon, and shall be countersigned by the person to whom granted in the presence of the circuit clerk. The circuit clerk shall receive therefor a fee of fifty cents. If the permit be used, the person receiving the same shall return it to the circuit clerk within thirty days after its expiration, with a notation thereon showing the date and manner of the disposition of such weapon. The circuit clerk shall keep a record of all applications for such permits and his action thereon, and shall preserve all returned permits. No person shall in any manner transfer, alter or change any such permit or make a false notation thereon or obtain the same upon any false representation to the circuit clerk granting the same, or use or attempt to use a permit granted to another." (Emphasis ours.)

Section 4826, supra, provides that no person shall transfer or procure possession of a pistol, revolver or other firearm until a permit to acquire such weapon is demanded and received by the seller, loaner or person delivering such weapon, and the transaction must be made within thirty days after the permit is issued. This statute further provides that the permit to acquire the weapon in question will be issued by the circuit clerk of the county in which the applicant resides,

October 12, 1945

if the sheriff be satisfied that the person is qualified to possess the weapon.

Attention is invited to the underscored wording of Section 4826, supra, which is quite clear and understandable. This provision requiring the circuit clerk to keep a record of permits issued and returned, in effect, provides for a registration of firearms of all types whenever there is a transfer of possession. The records are to be maintained by a public officer in a public office. However, this section does not provide specifically for the registration of firearms of any type.

Under the circumstances described in your letter the parties concerned already have the weapons in their possession, and, as you have stated, possession was procured in most cases in foreign countries. You present a situation in which men are returning from the Military Service from world-wide theaters of war and mortal combat. They have brought home with them grim mementos of the battle field, some of which still have their lethal sting.

Many such weapons will be kept at home for souvenirs, purely for exhibition. However, some are either capable of being fired or will be made so by proper repairs, and herein lies the problem of recording the ownership of such deadly weapons.

At the time such weapons were procured, and under the circumstances by which they were procured, it was obviously impractical, if not impossible, for the servicemen to comply with the sections of the statutes incorporated in this opinion dealing with obtaining a permit. The returning servicemen have previously acquired possession of the pistols, revolvers and other firearms, and at the present time have these weapons in their possession. Consequently, the question of securing a permit from the circuit clerk, as provided in Section 4827, supra, is not involved. The State of Missouri does not provide specifically for the registration of pistols, revolvers or other firearms.

In response to further inquiries which may be made by returning servicemen regarding registration of the described weapons, it is suggested they be informed that transfer of possession of such weapons should not be made except under strict compliance with sections of the statutes treated in this opinion.

October 12, 1945

Your attention is invited to the fact that the provisions of the federal laws dealing with the transportation of firearms of various descriptions into the country and between the states, and dealing with the registration of firearms, are not treated in this opinion. For additional information it is suggested that you consult the federal statutes covering the problem set forth in your letter.

Conclusion.

Therefore, it is the opinion of this department that: (1) Section 4827, R.S. Mo. 1939, provides for obtaining a permit to procure possession of pistols, revolvers or other firearms, capable of being concealed upon the person, and further provides that the weapons must be stamped as prescribed by law. This section does not provide for registration of firearms; (2) Section 4825, R.S. Mo. 1939, provides for methods of stamping of weapons and for keeping of records by those engaged in the business of selling weapons, relating to transactions involving purchase and sale of weapons. Such records are available for inspection by any police officer or peace officer of the State; (3) Section 4826, R.S. Mo. 1939, requires that permits must be demanded and received before delivery of the weapon can be made. It also states who shall issue the permits and the conditions under which they shall be issued. By requiring the circuit clerk to keep a record of permits issued and returned, there is, in effect, a registration of firearms accomplished when transfer of possession is made. However, this section does not specifically provide for the registration of pistols, revolvers or other firearms; (4) the State of Missouri has no law providing specifically for the registration of firearms of any type; (5) in response to further inquiries by returning servicemen regarding registration of firearms brought home with them, it is suggested that they be instructed not to transfer possession of such firearms without complying with the sections of the statutes treated herein; (6) the federal statutes covering the problem set forth in your letter are not treated in this opinion.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:ml

INHERITANCE TAX: Liability of the estate of a deceased soldier for payment of Missouri Inheritance Tax.

January 16, 1945



Honorable Robert W. Winn
State Treasurer
Jefferson City, Missouri

Attention: Mr. C. L. Gillilan

Dear Sir:

Reference is made to your letter of January 8, 1945, with respect to the liability for Missouri Inheritance Tax on funds in the hands of the administrator of the estate of a deceased soldier. The facts relating to such case are quoted in your letter, as follows:

"The deceased soldier was an army aviator and was killed some two years ago in the line of duty. There was due him and was paid to the administrator of his estate some \$5,000 in back-pay allowances and bonus."

An examination of the Federal statutes relating to the payment of such funds so described in your letter discloses that no attempt has been made to exempt such funds from the payment of State Inheritance Tax.

Conclusion

It is the opinion of this office that, under the facts outlined above, distribution of the funds so now in the hands of the administrator of the estate are sub-

Honorable Robert W. Winn -2-

January 16, 1945

jeet to the tax imposed by Article 21, Revised Statutes
of Missouri, 1939.

Respectfully submitted

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

WFB:ER

CONTRACTS OF STATE TREASURER AND : Form and provisions of contracts
STATE DEPOSITORY WITH CUSTODIAN : found to comply with the statutes
OF SECURITIES : of Missouri

May 31, 1945



Honorable Robert W. Winn
State Treasurer
Jefferson City, Missouri

Dear Mr. Winn:

This will acknowledge your letter to General Taylor, under date of May 29, 1945, in which you request an opinion respecting the legality of the form and provisions of contract agreements to be entered into by you with the Industrial Bank and Trust Company of St. Louis, Missouri, and the Chemical Bank and Trust Company of New York City, New York, creating the said Chemical Bank and Trust Company as custodian for securities required to be deposited by the said Industrial Bank and Trust Company of St. Louis as a depository of State funds, has been received and assigned to the writer to prepare the opinion.

Your letter states:

"The enclosed forms are contract agreements to be entered into by the State Treasurer of Missouri, the Industrial Bank and Trust Company, St. Louis, Missouri and the Chemical Bank and Trust Company of New York City, New York, relative to the Chemical Bank and Trust Company acting as custodian for securities posted as collateral by the Industrial Bank and Trust Company, St. Louis, Missouri to secure State of Missouri funds deposited in the Industrial Bank and Trust Company.

"Kindly render this office your opinion as to whether or not this agreement is in proper form and meets with the requirements of the

of the laws of the State of Missouri."

These contracts provide that the said Chemical Bank and Trust Company of New York City, New York, shall be custodian of some of the securities required to be deposited by the depositories of State funds under Section 13086, Article 2, Chapter 87, R. S. Mo. 1939. Said Section, 13086, provides that the Governor, Attorney General and the State Treasurer shall require the selected and approved banks or banking institutions as such depositories to secure the funds deposited with them by depositing for safekeeping and payment of such deposits bonds or securities that may be selected from the sixteen (16) types of bonds and securities mentioned in said Section.

The State through the State Treasurer's Office has its primary contract with the State depositories under said Section 13086, requiring the deposit of such securities for the protection of the public funds on deposit with them. Said Section 13086 further provides that at any time such bonds or securities are not satisfactory to the Governor and the Attorney General, the Governor and the Attorney General may require of such depository such additional securities as may be satisfactory to the Governor and Attorney General, and provides that such additional securities may from time to time be withdrawn on the written consent of the Governor, Attorney General and State Treasurer.

These contract forms submitted here, providing for the selecting of said Chemical Bank and Trust Company, in no way interfere with or lessen the safety of the public funds or the bonds or securities which secure them. The said Industrial Bank and Trust Company of St. Louis, is held to primary obligation to the State as a depository of the public funds and must at all times keep sufficient bonds and securities deposited in the vaults of the State Treasury or in the vaults of banks or trust companies other than the depository itself to secure such funds.

It is, therefore, in keeping with both the letter and spirit of the statute that the said Industrial Bank and Trust Company as such depository may select the said Chemical Bank and Trust Company as a custodian of such bonds and securities as the said depository desires to place with said custodian, and that you join in such contracts.

These contracts in fact do add to the security of the public funds on deposit with said depository, because the terms of the contracts confer the right upon the State Treasurer to demand and receive directly from said custodian such securities

Honorable Robert W. Winn

-3-

May 31, 1943

without notice to or the consent of said depository and compel their conversion into cash for any loss or default or anticipation thereof of State funds in such depository.

The form of the contracts is in conformity to the laws of the State of Missouri.

CONCLUSION.

It is, therefore, the opinion of this Department that these proposed contracts are in proper form and meet the requirements of the laws of the State of Missouri, and will constitute an aid to the security of the public funds of the State.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GEC:ir

STATE TREASURER: Payment to State of Missouri by U. S. Treasurer under provisions of 26 Stat. L., 417, 418, and 49 Stat. L., 436, 439, should be deposited in Seminary Fund.

August 4, 1945



Honorable Robert W. Winn
State Treasurer
Jefferson City, Missouri

Attention: Mr. Albert F. Smith, Assistant Cashier

Dear Sir:

Reference is made to your letter dated July 28, 1945, requesting an official opinion of this office, and reading as follows:

"This office is in receipt of a U. S. Check in the sum of \$63,194.22 payable to State Treasurer. Accompanying this check is the following notation 'Act of Congress approved August 30, 1890, (26 Stat. L., 417, 418) to receive the funds authorized by Title II, Section 22 of the act of Congress approved June 29, 1935 (49 Stat. L., 436, 439), for the more complete endowment and support of colleges of agriculture and mechanic arts (landgrant colleges):'

"Being unfamiliar with this particular U. S. Statute, we are not sure to what fund this money belongs. We presume it should be placed in the Seminary Fund, but want to be sure.

"Kindly advise us at once where to place this money, so that we may give the proper fund credit."

Honorable Robert W. Winn

-2-

August 4, 1945

The Federal statutes referred to in your letter are to the following effect:

The original so-called "Morrill Act" is found in 26 Statutes at Large 417, and its purpose is set out in the title, reading as follows:

"An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts established under the provisions of an act of Congress approved July second, eighteen hundred and sixty-two."

This act makes the appropriation to the various States that have established the land-grant colleges, all of such appropriation arising from the sale of public domain. With respect to the immediate subject of your inquiry, your attention is directed to a portion of Section 2 of the act, reading, in part, as follows:

"That the sums hereby appropriated to the States and Territories for the further endowment and support of colleges shall be annually paid on or before the thirty-first day of July of each year, * * * to the State or Territorial treasurer, or to such officer as shall be designated by the laws of such State or Territory to receive the same, who shall, upon the order of the trustees of the college, or the institution for colored students, immediately pay over said sums to the treasurers of the respective colleges or other institutions entitled to receive the same, * * *"

The other Federal statute, found in 49 Statutes at Large 436, is merely supplementary to the above quoted law, providing additional appropriations. The portion thereof which affects the allotment just received by your office is found under Title II, Section 22, and reads as follows:

August 4, 1945

"In order to provide for the more complete endowment and support of the colleges in the several States and the Territory of Hawaii entitled to the benefits of the Act entitled 'An Act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts', approved July 2, 1862, as amended and supplemented (U. S. C., title 7, secs. 301-328; Supp. VII, sec. 304), there are hereby authorized to be appropriated annually, out of any money in the Treasury not otherwise appropriated,
* * *

" * * * The provisions of law applicable to the use and payment of sums under the Act entitled 'An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts established under the provisions of an Act of Congress approved July second, eighteen hundred and sixty-two', approved August 30, 1890, as amended and supplemented, shall apply to the use and payment of sums appropriated in pursuance of this section."

From the foregoing, it is apparent that all of the allotment received by your office from the United States Treasury has been derived from proceeds of the sale of the public lands as originally donated to the various States and Territories under the Act approved July 2, 1862, and amendatory and supplementary statutes enacted subsequent thereto.

Having so ascertained the source of such funds, we believe that your question as to which fund is the proper one in which to deposit such allotment is answered by the provisions of Section 10276, R. S. Mo., 1939, reading, in part, as follows:

"There is hereby created and especially established a fund for the support of the university of the state of Missouri, the

Honorable Robert W. Winn

-4-

August 4, 1945

college of agriculture and the school of mines and metallurgy, to be denominated the seminary fund, which shall consist of: * * * Third, the proceeds of the sale of the lands donated to the state of Missouri by the United States for the support of the college of agriculture and the school of mines and metallurgy, by act of congress, approved July 2, 1862, * * *."

CONCLUSION

In the premises, it is the opinion of this department that the allotment received by the State Treasurer should be deposited in the Seminary Fund.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

APPROPRIATION OF LICENSE FEES PAID BY MOTOR : Counties, road districts and
VEHICLES OF MISSOURI TO COUNTIES, ROAD DIS- : cities must file claim for its
TRICTS AND CITIES UNDER SECTION 5728, EXTRA : share of such funds with the
SESSION, LAWS OF 1944. : State Auditor who shall issue
warrant therefor to the State
Treasurer who may then pay the
same.

August 6, 1945

Honorable Robert W. Winn
State Treasurer
Capitol Building
Jefferson City, Missouri



Attention: Mr. Albert F. Smith.

Dear Mr. Winn:

This will acknowledge your letter of July 3, 1945, requesting an opinion concerning the subject matter mentioned in your letter. Your letter is also accompanied by House Bill #429, an Act passed by the 1945 Legislature, which has a part thereof, Section 32, which constitutes the basis of your request for this opinion. Your letter states:

"The State Legislature made an appropriation for the payment of the pro-rated Bus & Truck Fees to the various Counties, cities, towns, and Special Road Districts as shown in Section 32 of House Bill 429, copy of which is attached hereto, but the Legislature did not make any provision as to how the payments were to be made or by whom they were to be made.

"The 1943 Legislature provided by an additional section, that the State Treasurer should notify the County Courts of the various counties and the Board of the City of St. Louis, who should make a requisition for the amount of money due them, and then the money was sent to the County Clerk, whose duty it was to disburse it to the various cities or towns or road districts, to which it belonged in that particular county.

"In the absence of any provision as to manner of payment, the State Treasurer respectfully requests an opinion

August 6, 1945

from your office as to the manner of payment and by whom to be made under the appropriation set out in Section 32 of House Bill 429, relative to payment of fees due the various counties, cities, towns and Road Districts, from the Bus and Truck Fees for the Biennium 1943 and 1944."

Section 32, House Bill 429, page 16, states that said appropriation was under Section 5728, R.S. Mo. 1939. Section 5728, R.S. Mo. 1939, was repealed by the Act of 1943, at page 864, and a new Section known as 5728 was enacted in lieu thereof, which included provisions practically and effectually the same as were the provisions of Section 5728, R.S. Mo. 1939.

Said Section 5728, Laws of 1943, appearing at pages 864 and 867, inclusive, was in turn repealed by the Extra Session of the Legislature, Laws 1944, page 45, and a new Section to be known as Section 5728 was enacted, covering the same subject matter, with practically the same provisions as were contained in the Revision of 1939, and in the Act of 1943, above referred to, and is in part as follows:

"(a) In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in section 5721 shall, at the time of the issuance of a certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1, and January 15 of each calendar year, pay to the state treasurer of the State of Missouri the annual license fee, as set out in this article, for the maintenance and repair of the public highways; * * *

* * * * *

"In all cases where the mileage of any route covered by any certificate of convenience and necessity and/or an interstate permit issued under the provisions of this article shall be in question,

August 6, 1945

the public service commission shall by order determine such question and the order of the public service commission in such cases shall be final.

"For the purpose of determining the mileage of any such route, the certificate of the state highway commission, with respect to state highways, the county engineer, with respect to county or other highways not constituting a part of the state highway system, or of the streets of any municipal corporation, and in the case of streets in any municipal corporation, the certificate of any city engineer or mayor shall be accepted by the public service commission as conclusive evidence:

* * * * *

"The commission, upon the issuance of a license for any vehicle, as defined in this article, shall notify the state treasurer who shall receive the license fee for such vehicle; and the commission shall also notify the state treasurer of the number of lineal miles of route used by the owner of that vehicle and the number of miles in which it operates on state roads, the number of miles it operates on county roads and the number of miles it operates on city roads not maintained by the state highway commission, and the state treasurer shall distribute and credit to the state highway commission and to the proper county or city in the proportion that the number of lineal miles of route used by the licensed motor vehicles in each case bears to the number of lineal miles of route over which such carrier operates and the said funds so derived from said license shall be used for the maintenance and repair of the highways and streets over which said carrier operates."

Thus we observe that the appropriation made by Section 32 of House Bill 429, must be based upon Section

August 6, 1945

5728, Laws 1944, Extra Session, instead of Section 5728, R. S. Mo. 1939, since said Section in Revised Statutes 1939, was repealed as above indicated.

Section 44a, Article IV, of the last Constitution of Missouri, at the top of the left column, page 93c, is as follows:

"* * * All state motor vehicle registration fees, license taxes or taxes authorized by law on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation shall, after the issuance of any of said bonds and so long as any of said bonds herein authorized remain unpaid, be and stand appropriated without legislative action, to the payment of the principal and interest of the said bonds and for that purpose shall be credited to the State Road Bond Interest and Sinking Fund provided by law. * * * "

Said Section 44a of said Article IV of the Constitution in the first independent paragraph in the right column, on page 93c, is as follows:

"After the principal and interest of all of said bonds shall have been paid, all state motor vehicle registration fees, license fees or taxes, authorized by law, on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels, authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department

and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation, shall be and stand appropriated without legislative action to the State Road Fund, to be administered and expended under the direction and supervision of the State Highway Commission for the purposes and in the manner hereinbefore set forth."

It will thus be observed that State license fees and taxes on common carrier motor vehicles were exempted from vehicles required to pay the additional license fees and taxes named in Section 5728, Laws of Missouri, 1944, Extra Session, so that the license fees and taxes paid by that class of motor vehicles did not "stand appropriated, without legislative action to the State Road Fund," but were subject to legislative action appropriating the funds derived from such source to other purposes.

The Legislature of this State at the Special Session of 1944, had the right, without Constitutional restriction, to enact Section 5728, found on page 45 of the Special Session Acts of 1944, providing that the license fees and taxes imposed upon motor vehicles therein named, should go to the counties, cities and road districts therein named. The appropriation of like funds had been made by the Legislatures in the Sessions of 1941 and 1943, evidently with full knowledge of the exemption provisions in Section 44a, Article IV, supra, of the old Constitution, as to such motor vehicles.

Section 32 of House Bill 429, makes a like appropriation of such license fees and taxes as were made by the Legislature in its respective Sessions of 1941 and 1943. The only difference between the appropriations in House Bill 429, and the Acts of 1941 and 1943, appropriating money out of the same fund, and for the same purposes, as does House Bill 429, is that House Bill 429 does not carry the machinery as was set up in the Acts of the Legislature of 1941 and 1943, specifically directing the Treasurer as to the method he should follow in distributing the fund.

The appropriating language of Section 32 of House Bill 429, is as follows:

"Section 32. There is hereby appropriated out of the State Highway Department fund, and from the \$1,555-658.60 annual motor carriers license fees collected during the biennium

of 1943 and 1944 under Section 5728, R.S. 1939, the total amount of \$106,590.63 to be paid to the counties, cities and road districts as hereinafter named in the amounts set forth opposite their names, as follows;"

Then follows the names of the counties, cities and road districts to which said funds are to be paid.

Even though there is a failure in House Bill 429 to direct the State Treasurer as to the method he should follow in distributing such appropriated funds, each county, city and road district named in said Section 32 would have, and does have, the legal right to present its claim to the State Auditor for auditing, and for the issuance of his warrant to the State Treasurer to be paid the respective sums as allocated to them from truck fees and bus fees as specified and as set opposite their respective names in said Section 32.

The State Treasurer, is by law, prohibited from paying money out of the State Treasury except as may be specifically directed by law.

This was stated in Section 15 of Article X of the recent Constitution of Missouri, pages 150c and 151c, in force when Section 5728, Special Session 1944, was passed, is as follows:

"Sec. 15. Deposit of State funds by treasurer--how disbursed.-- All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney General, select, the said bank or banks giving security, satisfactory to the Governor and Attorney General for the safekeeping and payment of such deposit, when demanded by the State Treasurer on his check--such bank to pay a bonus for the use of such deposits not less than the

August 6, 1945

bonus paid by other banks for similar deposits; and the same, together with such interest and profits as may accrue thereon, shall be disbursed by said Treasurer for the purposes of the State, according to law, upon warrants drawn by the State Auditor, and not otherwise."

To the same effect, is Section 28, Article IV of the New Constitution of Missouri, which is as follows:

"Section 28. No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditures is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

The exact question and subject matter was not involved in the case, but the same principle here involved, was being considered by our Supreme Court in the case of State ex rel. vs. Treasurer of Missouri, 41 Mo. 590, l.c. 593. In determining the duties and powers of the State Treasurer in paying out public money, the Court said:

"It is the province of the Treasurer to see that all warrants presented to him are drawn against the proper fund, and drawn in such a manner as to make them, when paid, such vouchers as will show conclusively to whom and

August 6, 1945

for what services the public moneys
have been paid out by him. * * *

Section 13021, Article 1, Chapter 87, defines the duties of the State Auditor, with respect to hearing and auditing claims against the State. Said Section is as follows:

"The state auditor shall be the general accountant of the state, and the keeper of all public account books, accounts, vouchers, documents, bonds and coupons, paid or redeemed, And all papers relating to the accounts and contracts of the state, and its revenue, debt and fiscal affairs, not required by law to be placed in some other office, or kept by some other person, and he shall also be secretary of the state board of equalization, and shall cause all of the clerical work of said board to be performed by the clerks in his office."

Sections 13042 and 13043, setting forth the duty of the State Auditor to draw, and the State Treasurer to pay warrants for claims audited and allowed against the State, are respectively, as follows:

"Auditor to draw warrant on treasurer for claims allowed. -- In all cases of accounts audited and allowed against the state, and in all cases of grants, salaries, pay and expenses allowed by law, the auditor shall draw a warrant on the treasurer for the amount due. The warrant shall be in the following form:

No. _____
(Seal) Office of the State Auditor.
Jefferson City, Mo.

_____, 19 ____.

The State Treasurer of Missouri:

Pay to _____ in cash, or by state
treasurer's draft made to his order _____
dollars out of any money appropriated _____

for the payment of _____.

State Auditor.

By _____
Chief Clerk.

"Provided, that in all cases where state moneys are to be mailed to the payee of state auditor's warrants, the state auditor shall take his warrant to the state treasurer's office and exchange such state warrants for state treasurer's drafts."

Section 13043:

"No warrant to be drawn or paid unless money appropriated for payment --
No warrant shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

Section 30 of Article IV of our New Constitution, page 33 and page 34, exclusively and perpetually appropriates all State license fees and taxes upon motor vehicles, trailers and motor vehicle fuels, and respecting the manufacture, receipt, storage, distribution and sale, or use thereof, except sales tax on motor vehicles and trailers, and all property taxes, for the purpose of constructing and maintaining the State Highways. That part of said Section 30, so providing, is as follows:

"For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage,

August 6, 1945

distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes.) less the cost, (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other: "

While it is true that Section 5728, Extra Session 1944, was not in conflict with Section 44a, Article IV of the former Constitution of this State, because the fees and taxes paid by common carrier vehicles were exempted by said Section 44a from being appropriated for the construction and maintenance of highways, said Section 5728 is in conflict with Section 30, Article IV as hereinabove quoted, of our present Constitution. However, said Section 5728, Laws of 1944, Extra Session, even though so in conflict with the Constitution, unless sooner amended or repealed, will remain in force under the terms of Section 2 and Section 5 of the Schedule of our New Constitution as read together, page 62, of the outstanding pamphlet containing the Constitution. Section 2 is as follows: (Section 5 being hereinafter quoted in a later paragraph):

"Section 2. All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in force and effect until July 1, 1946."

Section 5728, found in Laws of 1944, Extra Session being lawfully enacted, and in harmony with the Constitution of 1875, and the appropriation passed by the present session of the General Assembly, known as House Bill 429

August 6, 1945

construed together, created valid obligations of the State of Missouri respecting the claims therein enumerated. By the terms of Section 5 of the Schedule, appended to the Constitution of 1945, such claims maintain their validity under the new Constitution, and may be lawfully paid according to law. Said Section 5 of the Schedule, appended to the Constitution of 1945, reads as follows:

"All rights, claims, causes of action and obligations existing and all contracts, prosecutions, recognizances and other instruments executed or entered into and all indictments which shall have been found and informations which shall have been filed and all actions which shall have been instituted and all fines, taxes, penalties and forfeitures assessed, levied, due or owing prior to the adoption of this Constitution shall continue to be as valid as if this Constitution had not been adopted."

The claims of the various counties, cities and road districts thereby constitute obligations which may be presented to and audited by the State Auditor in accordance with the sections quoted, *supra*, and upon his determination that the same are valid may be paid upon a warrant issued by the State Auditor directed to the State Treasurer.

It is apparent from the positive terms of said Section 30, Article IV of the new Constitution, hereinabove quoted, that such State license fees and taxes therein mentioned, upon the motor vehicles therein mentioned, may not again be appropriated by the Legislature for any purpose whatsoever, because said Section 30, constitutes a perpetual appropriation of all of such funds exclusively for the construction and maintenance of an adequate system of connected highways in this State. Any appropriation thereof hereafter would be in conflict with said Section 30, Article IV, of the present Constitution, and would be void.

CONCLUSION.

It is, therefore, the opinion of this Department:

1) That Section 32 of said House Bill 429, does not contain sufficient direction to authorize the State Treasurer how to pay, or to whom to pay the funds appropriated.

August 6, 1945

2) That said Section 32 of said House Bill 429, does, in the appropriation of the funds involved to the respective counties, road districts and cities of the State, create a financial obligation upon the part of the State to each of them for the amounts set opposite to their respective name. That each of them has the right to present a claim for the amount so appropriated to each of them to the State Auditor for allowance, and that if and when allowed by the State Auditor he may issue his respective warrants to each of them drawn on the State Treasurer, who, under the statutes hereinabove cited and quoted, will be authorized to pay said respective amounts to the owners thereof. Such warrants to be drawn in conformity to the terms of Section 13042, R.S. Mo. 1939, supra, and so as to make them, when paid, such vouchers as will show conclusively to whom paid, and for what claims public monies have been paid out by the State Treasurer.

3) That if, under such statutes as are now in force, other like fees and taxes should be collected from like sources, the same method of disbursement should be followed until July 1, 1946, unless such statutes be sooner amended or repealed.

4) That after July 1, 1946, under the provisions of Section 30, Article IV, of the New Constitution of this State, all State revenue derived from highway users as an incident to their use or right to use the highways of this State, including all State license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes), shall be credited to a special fund and stand appropriated without legislative action for the purpose of constructing and maintaining an adequate system of connected State highways, and only for the purposes set forth in said Section 30.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

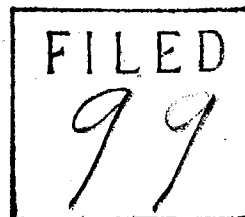
PUBLIC SERVICE COMMISSION:

Motor Vehicles

Public Service Commission does not have power to license and regulate a nonresident who owns and operates a store in neighboring state and regularly operates his own truck within the State of Missouri for the purpose of obtaining goods and supplies to be sold in his place of business in another state.

March 15, 1945

3/20



Honorable A. L. Wright
Prosecuting Attorney, Stone County
Crane, Missouri

Dear Mr. Wright:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"A resident of the State of Arkansas, who owns and operates a store in that state rather regularly, operates his own truck to Springfield, Missouri, for the purpose of obtaining goods and supplies to be sold in his store in Arkansas without any kind of a Missouri truck license and without any writ of convenience and necessity. Is such use of our highways, under the above circumstance, lawful?"

State ex rel. Anderson v. Witthaus, 102 S. W. (2d) 99, 340 Mo. 1004, "to render one a 'common carrier', use of his facilities must be so extensive as to imply offer to serve entire public, or there must be other circumstances reasonably warranting inference that he was undertaking to serve all to the limit of his capacity, but one does not become a 'public carrier' because engaged exclusively in transporting persons or property, or because persons whom he serves take all of his facilities; test being whether he invited trade of public."

Sub-Section A, Section 5723, R. S. Mo. 1939, provides:

"The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license,

supervise and regulate every motor carrier in this state to fix or approve the rates, fares, charges, classifications, and rules and regulations pertaining thereto; * * * * *

Sub-Section B of Section 5720, R. S. Mo. 1939, defines:

"The term 'motor carrier,' when used in this article, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service, for hire as a common carrier; * * * * *

The registration of nonresidents and establishing a system of reciprocity, Section 8375, R. S. Mo. 1939, provides:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

March 15, 1945

An Arkansas merchant who operates his own truck into the State of Missouri for the purpose of obtaining goods and supplies to be sold in his store in Arkansas, would not be required to obtain a writ of convenience and necessity or any other Missouri vehicle license as long as he hauls his own goods in interstate traffic and does not hold himself out as transporting persons or property for hire. To be regulated by the Public Service Commission, a motor vehicle must also be a motor carrier under the provisions of the Public Service Act.

A nonresident owner of a vehicle is exempted from the provisions of our Motor Vehicle Act, requiring licensing, as long as the state, country or other residence of such nonresident owner grants exemptions in the same manner to vehicles registered under the laws of and owned by residents of this state.

CONCLUSION

A nonresident of the State of Missouri, who owns and operates a store in another state, regularly operating his own truck at points within the State of Missouri for the purpose of obtaining goods and supplies to be sold in his store in another state, is not regarded as a motor carrier and subject to the rules and regulations of the Public Service Commission.

Respectfully submitted,

A. V. OWSLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AVO:kb

CONSTITUTIONAL LAW:

Probate Judge:

Probate Judge unlicensed to practice law may succeed himself in office and be magistrate.

April 18, 1945

4/30



Honorable Thomas G. Woolsey
Prosecuting Attorney
Boonville, Missouri

Dear Mr. Woolsey:

Under date of April 11, 1945, you wrote to the Honorable Vano Thurlo, Assistant Attorney General, requesting an opinion as follows:

"I believe that the newly adopted constitution has some inconsistencies. For instance, Section 25 of Article 5 provides that magistrates shall be licensed to practice law as shall probate judges, - except, however, present probate judges, even though they are not licensed to practice law, may succeed themselves. Also, present justices of the peace, or those who have served as such for four years or longer will be eligible to be elected magistrate.

"Cooper County has a population of less than 30,000 inhabitants. The two offices, probate judge and magistrate, must be held by the probate judge. Query: can our present probate judge, who is not a lawyer, succeed himself? He must be a lawyer to be the magistrate, and the magistrate must be probate judge.

"Our probate judge, Don U. Wilson, is very efficient, honest and reliable. We hope he can be re-elected. However, as I interpret the new document, I think he will be disqualified.

April 18, 1945

"This inconsistency has caused a great deal of consternation among some of us and I wish you would give it some consideration and let me have your interpretation of the section quoted."

As Mr. Thurlo is on leave of absence from this office at this time, your request has been assigned to the writer for reply. While it is a bit early for people to be interested in running for office in 1946, the question you ask is one of importance and one which will be of interest in a great many counties in the State and should be answered.

Before proceeding to a discussion of the question asked, it is necessary to call your attention to certain provisions of the Constitution of 1945 which are not mentioned in your letter, as well as the provision you do mention.

Section 17, Article V, authorizes probate courts. This section is as follows:

"Probate courts shall be courts of record and uniform in their organization, jurisdiction and practice, except that a separate clerk may be provided for, or the judge may be required to act ex officio as his own clerk."

Section 18 of the same article creates the magistrate courts in each county. The first two sentences of this section are pertinent to your inquiry and are as follows:

"There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court."

The portion of Section 25, Article V, referred to in your letter, is as follows:

"* * * Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, and except that persons who are now justices of the peace, or who have heretofore been justices of the

peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed."

In order to arrive at the answer to your question it is necessary for us to refer to a few fundamental principles of law pertaining to the construction and interpretation of constitutions. Those fundamental rules are taken from Corpus Juris Secundum, Volume 16:

Section 23, page 62:

"A constitution should be construed as a whole and effect given to every part, if possible."

Section 14, page 49:

"A constitution should be construed as fundamental law and should be interpreted in such manner as to carry out the broad general principles of government stated therein."

Section 15, page 51:

"Generally speaking, principles of construction applicable to statutes are also applicable to constitutions, but not to the extent of defeating the purposes for which a constitution is drawn."

Section 16, page 51:

"A constitution should be construed so as to ascertain and give effect to the intent and purpose of the framers and the people who adopted it."

Section 17, page 55:

"Unless the meaning of the terms employed is not clear, questions as to the wisdom, expediency, or justice of a constitutional provision play no part in the construction thereof."

Section 18, page 55:

"A clear and unambiguous constitutional provision cannot be evaded by construction because it works a hardship or absurdity, but a construction which will have such effect will be avoided if possible."

Bearing these rules in mind, we must also keep in mind the rule announced in the case of *Law v. Poople*, 87 Ill. 385, that "a strained construction or astute interpretation to a constitutional clause, such as will avoid the intent of the framers of the instrument, will not be permitted in order to relieve against any individual or local hardships."

The foregoing rules of construction are all well established and have been frequently applied in cases, and in connection we call your attention to the following brief quotations.

In the case of *Mitchell v. Lowden*, 123 N. E. 566, a case wherein the Supreme Court of Illinois was construing a constitutional amendment pertaining to the construction of highways, the court at l. c. 569 used the following language:

"* * * A constitutional provision must be construed like a statute with reference to the object to be accomplished, and when the real purpose is apparent the language must be construed so as to carry the purpose into effect. It is not to be presumed that a provision was inserted in a Constitution or statute without reason or that a result was intended inconsistent with the judgment of men of common sense guided by reason. Not the letter of the law only, its mere words, but its spirit and object, must be taken into consideration, and when a particular intent to effect a specific purpose is manifest, respect must be paid to that intent. * * *"

And again in the case of *Bakkenson v. Superior Court*, 241 Pac. 874, the Supreme Court of the State of California, in

construing a constitutional amendment pertaining to the jurisdiction of justices of the peace, pronounced the following rule (1, c. 876):

"* * * In order to determine what the framers of said amendment intended by the language employed in the foregoing portion thereof, the entire scope and purpose of said amendment as expressed in the terms thereof when read as a whole must be looked to and given effect, * * *"

Further, in the case of *Watkins v. Duke*, 82 S. W. (2d) 248, the Supreme Court of Arkansas in construing a constitutional amendment pertaining to taxation, ruled as follows:

"The first sentence of the section just quoted, if it stood alone, would be decisive that no city in this state has the power or authority to levy any special tax thereunder for the purposes stated therein in excess of 5 mills on the dollar for any one year, but the language which immediately follows renders it somewhat uncertain. Under such circumstances, it becomes our duty to resort to well-known canons of construction. The primary intent of the framers of the amendment should be ascertained, *Lybrand v. Wafford*, 174 Ark. 298, 296 S. W. 729, and in case of ambiguity, such interpretation should be adopted as to avoid inconvenience and absurdity. *Hodges v. Dawdy*, 104 Ark. 583, 149 S. W. 656."

The Constitution provides for probate courts and magistrate courts. It also provides that in counties having a population of 30,000 inhabitants or less the probate judge shall be the magistrate. It further provides that probate judges and magistrates shall be lawyers, except that probate judges now in office may succeed themselves if they are not lawyers and that persons who have previously been justices of the peace in this state for at least four years, shall be eligible for the office of magistrate. At first glance it

April 18, 1945

would seem that there may be a conflict in those provisions, for in one place the provision requires magistrates, with the one exception that the persons who have served as justices of the peace for at least four years, must be lawyers. However, in construing the provisions of the Constitution, we must consider them all together, and the same section of the Constitution which prescribes the qualifications for judges of the probate courts and for magistrates also permits a judge of the probate court, who is now in office and who is not licensed to practice law, to succeed himself. To hold that the Constitution authorizes a probate judge, who is not a lawyer, to succeed himself to the office of probate judge, but that the provision of the Constitution relating to magistrates forbids him to be a magistrate, when the Constitution further specifically provides that the judge of the probate court in counties having a population of 30,000 inhabitants or less, shall be the magistrate, would be the height of absurdity and would place an interpretation upon the Constitution which would convict the framers of the Constitution of gross carelessness.

Inasmuch as the Constitution specifically declares that in counties having a population of 30,000 inhabitants or less, the judge of the probate court shall be the magistrate, and further provides that a probate judge who is not a lawyer may succeed himself as probate judge, it necessarily follows that he may also be the magistrate.

Conclusion

It is, therefore, the conclusion of this department that in counties having a population of less than 30,000 inhabitants, a probate judge who is now serving, if re-elected, may succeed to the office of probate judge and may also serve as the magistrate.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

COUNTY COURT: Proceeds of sale of county farm should be returned to general revenue fund of the county.

September 28, 1945

FILED

99

Honorable A. L. Wright
Prosecuting Attorney
Stone County
Crane, Missouri

Dear Sir:

Receipt of your letter under the date of September 22, 1945, is hereby acknowledged. Your letter requesting the opinion of this office is as follows:

"The county court of Stone County is thinking of selling the county farm.

"If the farm is sold to what uses can this money be applied? It is their thought that it should go back into general revenue funds from which it was taken at the time of buying the farm several years ago. It occurs to me that the money could not be used except for the same purposes to-wit: the purchase of another farm."

Article VI, Section 7 of the new Constitution is as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as proscribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

Section 2480, R. S. Mo. 1939, provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

By these provisions of the newly adopted Constitution and the statute it would seem that the county court would be authorized to return the proceeds of the sale of the county farm to the general revenue fund if there are no other provisions of the law denying such right.

In the case of Bayless v. Gibbs, 251 Mo. 492, the powers of the county were discussed and the court said:

"County courts are not the general agents of the counties of the State. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void."

Also, in the case of State ex rel. Major v. Patterson, 229 Mo. 375, the court said:

"Under the Constitution, Article VI, Section 36, providing that a county court shall have jurisdiction to transact all county business as may be prescribed by law, the county courts are denied any rights except those expressly conferred."

The same power to transact business as granted by Article VI, Section 36, Constitution of 1875, is also granted under the new

Constitution of 1945 in Article VI, Section 7.

In *Blades v. Hawkins*, 240 Mo. 187, the court held that county courts are given incidental powers. The court said:

"While the law is strict in limiting the authority of these courts, it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated, and indispensable to their performance, may be exercised."

While it may be that a fund raised for a specific purpose cannot be used for any other purpose, even a surplus thereby created goes into the general fund, as is found in *Avera v. Clyatt*, 109 S. E. 655, 152 Ga. 280, which states:

"While public funds of the county raised by taxation for specific purposes cannot be used for other purposes, when there remains a surplus after all property demands and indebtedness have been paid or deducted, it becomes the general fund, and may be lawfully applied to any legitimate liability of the county."

It is assumed that the county farm that you refer to came into being under the power of the county to provide a home for the poor under statutes conveying the same or similar power as Section 9596, R. S. Mo. 1939, which states:

"The several county courts shall have power, whenever they may think it expedient, to purchase or lease, or may purchase and lease, any quantity of land in their respective counties, not exceeding three hundred and twenty acres, and receive a conveyance to their county for the same."

And Section 9597, R. S. Mo. 1939, which provides:

Sept. 28, 1945

"Such county court may cause to be erected on the land so purchased or leased a convenient poorhouse or houses, and cause other necessary labor to be done, and repairs and improvements made, and may appropriate from the revenues of their respective counties such sums as will be sufficient to pay the purchase money in one or more payments to improve the same, and to defray the necessary expenses."

After a rather thorough search of the authorities and cases we find no law which requires the county court to dispose of money received for the sale of the county farm in any other method than to return said moneys to the general revenue fund of the county.

Conclusion

From the foregoing it is the opinion of this office that, should the county court of Stone County sell the county farm, the money received from the sale thereof should be returned to the general revenue fund of the county.

Respectfully submitted,

J. MARTIN ANDERSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JMA:EG

CORONERS: May not order autopsy except in connection with inquest.

EMPLOYEES OF STATE CANCER HOSPITAL: Not prohibited from performing autopsies for county coroners.

October 18, 1945

FILED

99

Honorable Thomas G. Woolsey
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Mr. Woolsey:

Under date of September 13, 1945, you wrote the Attorney General the following letter requesting an opinion upon the questions contained therein:

"My County Court requests an opinion from your office as to whether a state employee can legally charge a county for services rendered in connection with county business. Here are my facts:

"Louis Evans, a colored boy, was an inmate of the Missouri Training School. He died on or about the 29th day of July, 1945. Dr. Tinscher, the training school physician, called Mr. J. R. Smith, the Coroner, out to the training school to view the body of the deceased. The coroner ordered an autopsy to determine the cause of death. (The body was found in the hospital and the doctor estimated that he had been dead four or five hours when found.) The coroner engaged Lauren V. Ackerman, consulting pathologist of the Ellis Fischel State Cancer Hospital at Columbia, Missouri, to perform the autopsy. Mr. Ackerman rendered his bill to Cooper County for \$10.00 for performing the autopsy and making a statement as to what caused the death of the boy.

Oct. 18, 1965

"Query. (a) If Dr. Ackerman is an employee of the state, and I assume that he is since he is on the staff of the Missouri Cancer Hospital, can he charge Cooper County for performing the autopsy?
(b) Would the coroner have the right or authority to order the autopsy?"

The questions will be discussed in the order in which they are placed in your letter.

(1) May an employee of the State Cancer Hospital make a charge against a county for performing an autopsy in said county, which autopsy is not one of the regular duties of the employee for which he receives compensation from the State Hospital?

In order to reach the solution of this question it is necessary first to examine the statutes to ascertain if there is a general statute which would prevent a state employee from rendering a service to a county, which service is not a portion of the regular work of the employee, and we find no statute of this nature. A further examination of the statutes with particular reference to the State Cancer Hospital reveals only one section which would prohibit an employee of the State Cancer Hospital from receiving additional compensation. This is Section 15151, R.S. Mo. 1939, as follows:

"No compensation shall be charged or received by any officer of the hospital, or by any physician or surgeon or nurse or other employee in its employment, who shall treat or care for any patient in said hospital, other than the compensation provided for such person by the cancer commission of the State of Missouri."

It is apparent this section of the statutes has no bearing on your question. Hence, there is no statute which would prohibit the employee of the State Cancer Hospital from rendering a service, outside of his regular duties, to Cooper County, charging a fee for such service and receiving the fee.

As no statute governing such a situation has been found, it is necessary to examine textbooks and cases. These shed no light upon the question, for nothing has been found touching the right of an employee to accept extra employment, which does not interfere with the performance of his regular duties, from a second employer. The nearest approach to the problem is found in the cases dealing with dual office holding and the courts have held that absent statutory or constitutional prohibition a person may hold more than one office, where the duties of the office are not incompatible. The leading case in Missouri on this subject is *State ex rel. Walker v. Bus*, 135 Mo. 325, in which case it was held by the Supreme Court that the same person might hold the offices of deputy sheriff and school director.

As previously pointed out there is no statute applicable nor is there any constitutional provision.

While not squarely in point, if the reasoning of the *Bus* case, *supra*, is followed it leads to the conclusion that, absent constitutional or statutory prohibition, there would be no legal restriction upon an employee of the State Cancer Hospital which would prevent such employee from rendering a service, outside of his regular duties, to a county and making a charge for such service and receiving compensation therefor, if such extra service did not interfere with the performance of the regular duties of the employee.

In arriving at the foregoing conclusion, the rules and regulations of the State Cancer Hospital, if any, have not been considered as we do not have them.

(2) Does a coroner have the right or authority to order an autopsy?

The powers and duties of a coroner are prescribed by statute. And your attention is directed to the following sections from the Revised Statutes of Missouri, 1939, which are pertinent to your question.

Section 13231, R.S. Mo. 1939, authorizes the coroner to summon a jury for the purpose of conducting an inquest over the dead body of a person supposed to have come to his death

by violence. Section 13236, R.S. Mo. 1939, authorizes the coroner to charge the jury.

Section 13257, R. S. Mo. 1939, authorizes the payment of a fee to a coroner for conducting a post-mortem examination of a dead body when the coroner is a physician or surgeon. This section is as follows:

"Whenever the coroner, being himself a physician or surgeon, shall conduct a post-mortem examination of the dead body of a person who came to his death by violence or casualty, and it shall appear to the county court that such examination was necessary to ascertain the cause of such person's death, the county court may allow the coroner therefor an additional fee, not exceeding twenty-five dollars, to be paid as his other fees in views and inquests; but section 13250 shall not be construed to apply to any such examination when made by the coroner himself."

Section 13250, R. S. Mo. 1939, authorizes payment of a fee to a physician employed to conduct a post-mortem examination of a dead body when called in by a coroner. This section is as follows:

"When a physician or surgeon shall be called on by the coroner, or any magistrate of the county acting as the coroner, to conduct a post-mortem examination, the county court of said county shall be authorized to allow such physician or surgeon to be paid out of the county treasury any sum as a fee not exceeding ten dollars, to such physician or surgeon who may be engaged in said examination."

These sections, while not specifically authorizing post-mortem examinations, recognize the necessity of such examinations, in order to determine the cause of death in some cases. With this recognition of the necessity for such examinations and provisions being made for paying fees for services

rendered in making post-mortem examinations, unquestionably a coroner has the right and duty to make a post-mortem examination or to employ a physician to make a post-mortem examination if the coroner is not a physician or surgeon qualified to make the post-mortem examination.

There remains one question to be determined - When may a post-mortem examination be conducted? The statutes relating to the duties of the coroner do not specifically set out when a post-mortem examination may or may not be held. However, there are two comparatively recent cases which discuss and rule on this question. These cases are; Patrick v. Employers Mut. Liability Ins. Co., 118 S.W. (2d) 116, 233 Mo. App. 251; and Crenshaw v. O'Connell, 150 S. W. (2d) 489, 235 Mo. App. 1085.

The Patrick case, supra, was decided by the Kansas City Court of Appeals and was a suit for damages against an insurance company for causing an unauthorized autopsy or post-mortem examination to be performed. In discussing the power of a coroner to conduct a post-mortem examination, the court used the following language at l. c. 260 (Mo. App.):

"Under the provisions of these sections it seems apparent that the coroner has no authority to perform an autopsy under the circumstances here present, or have one performed, except in connection with an inquest to be held before a coroner's jury. It could hardly be said that section 11631, even standing alone, authorizes an autopsy, under any circumstances that the coroner might in his judgment, see fit to hold it for, on its face, it does not purport to be an authorization of that kind, but merely a section dealing with fees for the performance of an autopsy. Of course, it is beyond the realm of probability that the Legislature ever intended to confer upon a coroner the right to perform an autopsy in any case that, in his judgment, he might deem proper, for this would empower him to enter the homes of our citizens indiscriminately and over their protests

remove corpses under any circumstances, regardless of the cause of death, provided that the coroner thought an autopsy, in a particular case, would further the advance of science or some purpose believed desirable by him. The Legislature had no intention to confer any such authority upon the coroner. Section 11631 must be read in connection with the whole chapter in which it appears relating to 'inquests and coroners.' In no place in the chapter is the coroner authorized to hold an autopsy under the circumstances here present except in connection with an inquest, to be held before a jury, of persons supposed to have come to their deaths by violence or casualty, the latter term including accidents. In view of the circumstances surrounding Patrick's death the coroner, in his discretion might have conducted an inquest but there was none held and, therefore, the coroner had no authority to hold an autopsy. Indeed, there was evidence that it was not the intention of the coroner to hold an inquest as he testified that the autopsy was performed merely that he might have information upon which to make out a death certificate but, aside from this, while it might be desirable for the coroner to hold an autopsy to ascertain if an inquest should be held, the statute gives him no such authority."

The sections of the statutes referred to are Sections 11608, 11612 and 11631, R.S.Mo 1929. Sections 11612 and 11631 are now Sections 13231 and 13250, R.S.Mo. 1939.

The Crenshaw case, *supra*, was a suit for damages against a coroner for conducting an unauthorized autopsy. From this case we quote at length, beginning on l. e. 1090 (Mo. App.):

"The coroner, as we know him in this State, is a constitutional officer (Mo. Const., art. 9, secs. 9, 10 and 11), whose powers and duties with respect to the holding of inquests and autopsies are more or less

specifically defined and limited by statute, the same being sections 13227-13268, Revised Statutes of Missouri, 1939 (Mo. State. Ann., secs. 11608-11649, pp. 4279-4290).

"The above sections of the statutes have but recently been construed (and we think correctly so) by the Kansas City Court of Appeals in the case of Patrick v. Employers Mutual Liability Insurance Co., 233 Mo. App. 251, 118 S. W. (2d) 116, an action by a widow against a compensation insurer for damages sustained on account of the mutilation of her deceased husband's body in connection with an autopsy which the coroner unlawfully permitted to be performed at the instance and for the benefit of the defendant insurer.

"That case holds squarely that under such circumstances as confronted defendant in the case at bar, the law invests the coroner with no authority to have an autopsy performed except in connection with, and as an incident to, an inquest to be held before a jury upon the body of a person supposed to have come to his death by violence or casualty, the purpose of the inquest being to inquire, upon a view of the body, how and by whom such person came to his death; that while the coroner acts judicially, and has a discretion, with respect to determining whether an inquest shall be held, neither the inquest itself, nor the calling and holding of an autopsy in connection with it, is a proceeding judicial in character so as to relieve the coroner from civil liability for his acts in relation to it; that it was never intended that the coroner should have the right to order an autopsy performed in any case where, in

his mere judgment, an autopsy might be deemed proper for any such reason as the advancement of science or the like; and that while it might or might not be thought desirable that the coroner should have the power to hold an autopsy in order to determine whether an inquest should be held, the law gives him no such authority, so that in the case at least of a person who is merely supposed to have come to his death by violence or casualty, an autopsy performed except in connection with an inquest is unlawful and illegal, regardless of what might be the coroner's good faith in the exercise of a mistaken authority in the matter.

"It is true, as was noted in the course of the Patrick case, that certain sections of the statutes, and particularly Section 13255, Revised Statutes of Missouri, 1939 (Mo. Stat. Ann., sec. 11636, p. 4286), would seem to contemplate that in a case where the dead person is not merely 'supposed' to have come to his death by violence or casualty, but where some credible person has declared under oath to the coroner that the person whose body is to be viewed came to his death by violence or other criminal act of another, the coroner may dispense with a jury and himself view the body and declare the cause of death. We observe, however, that the court, in the Patrick case, reserved its decision upon the question of whether, under such circumstances, the coroner would have the authority to conduct an autopsy, and neither shall we determine the point, since in the case at bar, just as in the Patrick case, there was no declaration under oath by any person as to the circumstances under which the deceased had come to his death so as to have entitled defendant to refrain from holding an inquest, and, upon a coroner's view of the

body, himself declare the cause of death.

"Of course, if plaintiff, as the one entitled to the right of sepulture, had given her consent to the autopsy, there would have been no liability on defendant's part (in the absence of a performance of the autopsy in an improper manner), even though no inquest was held or basis afforded for defendant himself to have declared the cause of death upon a mere coroner's view of the body. However, neither plaintiff, nor any one for her, gave such consent, and consequently the autopsy must be held to have been unlawfully and illegally performed, unless it should be, as defendant also contends, that he was justified in ordering the autopsy so as to be able to sign a death certificate.

"As to this, suffice it to say that under the statute having to do with the coroner's duties in respect to registration of deaths (Sec. 9767, R. S. Mo. 1939 (Mo. Stat. Ann., Sec. 9047, p. 4191)), the coroner is authorized to make a certificate of death only when the case is referred to him by the local registrar as one without an attending physician and one where the circumstances of the case render it probable that the death was caused by unlawful or suspicious means. The purpose of such reference is, of course, to have an investigation by the coroner as the officer whose duty it is to hold an inquest on the body of any deceased person; and when such a case is properly referred to the coroner, he conducts his investigation, and then executes the certificate of death required for a burial permit, stating therein the disease causing death or the means of death, and otherwise making the same conform to the requirements of the statute. (O'Donnell v. Wells, 323 Mo. 1170, 21 S. W.

(2d) 762; Patrick v. Employers' Mutual Liability Insurance Co., supra; Gilpin v. Aetna Life Insurance Co., 234 Mo. App. 566, 132 S. W. (2d) 686.)

"In the case at bar, not only was the deceased receiving treatment from a doctor for high blood pressure up to the very time of his death, but, in addition, the case was concededly not referred to defendant by the registrar for his investigation and certification. Neither was defendant requested by the relatives or friends of the deceased to hold a view or inquest on the body for the purpose of issuing a certificate of the cause of death (Sec. 13253, R. S. Mo. 1939 (Mo. Stat. Ann., sec. 11634, p. 4285)), and so for the want of any of the circumstances empowering the coroner to make a death certificate, the autopsy performed upon the body of the deceased is not to be justified upon any such ground."

Under the statement of facts in your letter the two cases cited seem to be squarely in point, and the autopsy performed, as set out in your letter, was not lawfully performed.

Conclusion

It is, therefore, the opinion of the Attorney General that: (1) there is no statutory or constitutional provision, nor any decision, which would prevent an employee of the State Cancer Hospital from performing an autopsy or post-mortem examination, for a county coroner, and receiving compensation from the county for such service, if the conducting of the autopsy did not interfere with the performance of his regular duties or conflict with them; (2) the coroner did not have the authority to order the autopsy under the statement of

Hon. Thomas G. Woolsey

-11-

Oct. 18, 1945

facts contained in your letter.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WOJ:EG

COUNTY COURTS:

IN RE:

THE ERECTION OF CATTLE GUARDS ON
COUNTY ROADS.

FILED

99

November 7, 1945

11/20

Honorable A. L. Wright
Prosecuting Attorney
Stone County
Crane, Missouri

Dear Mr. Wright:

This will acknowledge your request for an opinion of this Department in a letter dated September 22, 1945, which reads as follows:

"In the south end of this county is located a forrest preserve owned by the Federal government.

"It is enclosed by the fences of adjoining owners. Through the forrest runs a county road. The government wants to rent the preserve to the public for grazing purposes. The government is unwilling to fence the roadway.

"Would it be a violation of law to place in the roadway cattle guards where the road enters and comes out of the preserve area? The cattle guard would be only large enough for a car, truck or wagon. A driver of stock or a person in wagon or buggy drawn by horses would have to enter from a gate to one side of the guard."

We think the matter presented in your letter of September 22, 1945, raises the following questions:

First: Are private persons authorized to place any obstruction upon public roads?

Second: Is the County Court authorized to allow any obstruction of the use of a public road?

November 7, 1945

A public road is for the use of the general public, and is a way which is open to all the people, without distinction, for passage, and repassage at their pleasure. Wright vs. City of Doniphan (1902), 169 Mo. 601; Carson vs. Baldwin (1940), 346 Mo. 984; State ex rel. vs. Vandalia (1906), 119 Mo. App. 406; In re 23rd Street vs. Crutcher (1919), 279 Mo. 249; State vs. Campbell (1899), 80 Mo. App. 110; State ex rel. vs. St. Louis (1900), 161 Mo. 371; State vs. Dixon, 335 Mo. 478; Sumner Co. vs. Interurban Transportation Co., 213 S.W. 412; 141 Tenn. 493; Cincinnati Railroad Co. vs. Commonwealth, 80 Ky. 137; Heninger vs. Peery, 47 S.E. 1013, 102 Va. 896.

In Carson vs. Baldwin, supra, the Court, l.c. 987, said:

"The common law condemns as a public nuisance any unauthorized or unreasonable obstruction of a highway which necessarily impedes or incommodes its use by the travelling public. It made indictable such a disturbance of the public convenience or safety. * * * "

In State ex rel. vs. Vandalia, supra, the Court, l. c. 416, 417, said:

"* * * A municipality holds its streets in trust for the general public, to be used, principally, as thoroughfares. (Glasgow v. St. Louis, 87 Mo. 678.) * * * "

In re 23rd Street vs. Crutcher, supra, at l. c. 277, 278, the Supreme Court of Missouri said:

"* * * The trust reposed in the City of St. Louis to regulate the use of the streets is for the purpose of keeping them open and free to all, and we can but conclude that the ordinance in question violates that trust and is void. * * * "

In State vs. Campbell, supra, at l. c. 113, the Court said:

November 7, 1945

"* * * Every person has a right to go over or upon any part of the highway, and the fact that from notions of economy, or otherwise, the public authorities having the same in charge have not seen fit to work the whole of it, does not alter or change the right. * * * "

In State ex rel. v. City of St. Louis, supra, at l.c. 383, the Court said:

"* * * 'The public highways belong from side to side and end to end, to the public, and "the public are entitled, not only to a free passage along the highway but to a free passage along any portion of it not in the actual use of some other traveler," and the abutting property-owner has the right to the free and unobstructed passage to and from his property.' (Schopp v. St. Louis, 117 Mo. 136-7; Sherlock v. Kansas City Belt Line, 142 Mo. 172; Knapp, Stout & Co. v. Railroad, 126 Mo. 26; Schulenburg v. Railroad, 129 Mo. 455.)"

The nature of a public road being what it is, it follows that any obstruction which denies the use of a public road to any part of the public, or which creates inconvenience thereto, is contrary to the very purpose for which the road was created. The cases have so held. Carson vs. Baldwin, supra; Williams vs. Beatty 139 Mo. App. 167; Downing vs. Corcoran, 112 Mo. App. 645.

However, it is not necessary to rely upon case authority for the proposition that a public road may not be obstructed, since we have a direct statutory prohibition. Section 8581, R.S. Mo. 1939, reads in part, as follows:

"* * * Any person or persons who shall willfully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road

or right of way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the sides or in the ditches thereof, or by fencing across or upon the right of way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any other manner whatsoever, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment. * * *

This statute has been construed in the case of *Wilmore vs. Holmes* (1828), 7 S.W. (2d) 410. That case was an action for damages for personal injuries sustained when an automobile turned over on a highway in Missouri. The plaintiff charged that defendant placed a pile of gravel on the side of the travel portion of the highway, which gravel extended over onto part of the main roadway. The plaintiff's car hit this gravel, and over-turned. The Court in that case held that the plaintiff should recover, under the theory of nuisance, and said in their opinion: "In fact, the placing of any obstruction on the highway is illegal and constitutes a misdemeanor. Section 10720, R.S. Mo. 1919." The 1919 statute was the present Section 8581.

That the placing of an obstruction upon a public road is a nuisance at common law, as well as a misdemeanor under the statute, is held in *Carson vs. Baldwin*, supra, quoted above; *Williams vs. Beatty*, supra, (where it was held that a person who altered a drainage culvert so as to obstruct a public road, was guilty of a nuisance); in *Downing vs. Corcoran*, supra, (where it was held that it was a nuisance to obstruct a road by piling rocks thereon, and digging ditches, obstructing the road); and in *State vs. Campbell*, supra.

The second question to be determined is whether or not municipal or county authorities can allow the obstruction of public roads.

In *Berry-Horn Coal Company, vs. Scruggs-McClure Coal Company et al.*, (1895), 62 Mo. App. 93, the defendant had constructed a building and platform containing private weighing scales, which extended out into the public highway passing through the village of Webster Groves, Missouri. This building and the scales operated to prevent the use of part of the public highway. The County Court of St. Louis County, had granted permission to the plaintiff's predecessor to erect the scales at the point in question. The plaintiff offered in evidence this order of the County Court. The Court in that case, l.c. 96, said:

"* * * Private scales are not a public purpose, and municipal authorities can not grant rights in highways for private purposes, and certainly not without the consent of the adjoining owner, who, in this case, is shown to have been the owner of the fee of the ground, subject to whatever easement the public may have acquired to travel over it.
Glaessner v. Brewing Association, 100 Mo. 514."

In *Brown et al. vs. Chicago Great Western Railway Company*, (1897), 137 Mo. 529, the defendant had constructed a railway side track along an alley in the city of St. Joseph, Missouri. The construction was pursuant to an ordinance of the city authorizing the construction of tracks on certain streets in the city. The plaintiff contended that the use which the defendant made of the tracks was purely private, and that the plaintiff had been damaged by the use of these tracks which ran along the side of buildings owned by the plaintiff. The Court held that the use being made of the tracks was not a private use but was a public use, which the city was authorized to allow. The Court in that case said, however, at l. c. 537:

"That the legislative bodies of cities have no power to authorize the use of their public streets for purely private purposes is too well settled to require discussion. Ordinances which undertake

to do so are invalid. Cummings v. St. Louis, 90 Mo. 263; Glaessner v. Brewing Ass'n, 100 Mo. 511; Schopp v. St. Louis, 117 Mo. 133; Lockwood v. Railroad, supra. "

In State ex rel. vs. St. Louis, supra, the question was raised as to whether the city could authorize the erection and maintenance of refuse boxes to be placed in the streets of the city, and to be used by the relator for advertising purposes. The Court, at l.c. 382, said:

"But there is another view to be taken of this ordinance. It subjects the public streets to a purely private purpose, to-wit, the advertising of individual business and enterprises. Can the city devote its streets to such a purpose? We hold that it can not. * * * "

Other cases holding that municipal authorities may not grant the use of public roads, or of public streets for private purposes are:

Glaessner vs. Brewing Association, 100 Mo. 511, (1890); Wright vs. City of Doniphan, supra; Morie vs. St. Louis Transit Company (1905), 116 Mo. 12.

It will be noted that several of the cases cited above are cases which involved the obstruction of public streets in cities and towns. We think, however, that the rights in a public street and in a public road are so similar as to make these cases clearly applicable to the situation now before us. We are, therefore, of the opinion that a County Court would have no authority to grant the right to create anything which would obstruct a County road if such obstruction was not clearly for a public purpose. The information which you very kindly gave to us, regarding the use of the Government Forest Preserve in Stone County, Missouri, reveals that a very small portion of the population would be entitled to graze cattle in the forest preserve. Therefore, only this very small portion of the people would be benefitted by the cattle guards placed on the County roads at the entrances to the forest preserve. Thus, the conclusion is inescapable that the construction of cattle guards in such places is for a

November 7, 1945

private purpose which the County Court would be unable to authorize.

CONCLUSION

It is, therefore, the opinion of this Department that the placing of cattle guards on the County road of Stone County at the entrances to the Government Forest Preserve in the southern part of that County would be a misdemeanor under Section 8581, R.S. Mo. 1939, and would also be a common law nuisance. It is the further opinion of this Department that the County Court of Stone County would be unauthorized to allow the erection of said cattle guards.

Some considerable study of the matter presented by your letter of September 22, 1945, leads us to the conclusion that, if the erection of the cattle guards which you mentioned, is of considerable importance to the people of that area, the only proper way to allow the erection of these cattle guards is by virtue of a Legislative enactment. An investigation of Bills now pending in the 63rd General Assembly discloses that there is a Bill now before that Assembly, which will allow private citizens to erect cattle guards over public roads, when this road runs through a part of the land owned by private individuals. This Bill was introduced by Representative Turley of Carter County, and its designation is House Bill #656. The information you forwarded us shows that at least some of the individuals who will graze their cattle in the forest preserve, own land within the preserve. Therefore, if the County road runs through their property, the House Bill referred to would authorize them to erect cattle guards. If this would not take care of the situation, we suggest that an attempt be made to amend the Bill through your representatives in the Legislature, so as to allow cattle guards to be placed at the entrances of the forest preserve. We are of the opinion that such an amendment would not be objectionable to the Legislature, and that, in fact, it would require very little alteration of the Bill to accomplish this purpose.

I enclose herewith, a copy of House Bill #656, which shows that the Bill was reported out by the Committee on Roads and Highways due pass, and was ordered perfected and printed.

Honorable A. L. Wright

-8-

November 7, 1945

The copy enclosed is the Bill as perfected. Any amendment now made would have to be made in the Senate since House Bills cannot be amended on third reading and final passage.

Respectfully submitted,

SMITH N. CROWE, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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